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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. ~~917~~ 85

JOHN F. WADE, MRS. CHARLES CURRAN, Executrix of the Estate of Charles Curran, as individuals and as partners under the name of Wade, Curran & Co., *Petitioners,*

vs.

UNION CARBIDE AND CARBON CORPORATION, UNITED STATES VANADIUM CORPORATION, ELECTRO METALLURGICAL COMPANY, ELECTRO METTALURGICAL SALES CORPORATION, ELECTROMETALLURGICAL COMPANY OF CANADA, LTD., and VANADIUM CORPORATION OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals

for the Tenth Circuit entered in the above entitled case on December 27, 1961.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not as yet reported. A copy of the opinion is attached hereto as Appendix A. No opinions were issued by the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 27, 1961 (R. 4, Appendix B.) Petitioners did not file a Petition for a Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court should grant this Petition in view of the fact that it raises the identical issue presented in *Continental Ore Company, et al. v. Union Carbide and Carbon Corporation, et al.*, No. 304, certiorari granted October 23, 1961, in the same industry, involving the same actors, but with a variation of the factual situation with respect to alleged authorization from a sovereign to violate the antitrust laws.

2. Are conspirators having the purpose and intention of monopolizing an industry and eliminating all competition liable under the antitrust laws for causing the finan-

cial destruction of a competitor resulting in his elimination from an industry where, although his property rights are purchased by the Manhattan District for governmental use, the evidence is substantial that his property rights would not have been sold to or acquired by the Manhattan District but for the prior impact of the conspiracy on the financial condition of the competitor.

3. Whether or not the use of a governmental agency to administer the final blow to an injured competitor who had sustained his injury by reason of a combination between admitted monopolists predicated upon non-governmental acts gives immunity under the antitrust laws.

4. Whether the elimination of a substantial competitor by a combination of private acts and acts performed pursuant to governmental decision absolves acknowledged conspirators from civil liability under the anti-trust laws.

5. Whether a private company which is authorized to act in a governmental capacity escapes liability under the antitrust laws or is allowed judicial exemption from the antitrust laws for actions which it pursues for the purpose of eliminating competition and achieving a monopoly pursuant to an admitted conspiracy to monopolize.

6. Whether petitioners can be deprived of their judgment of $600,000 (after verdict by jury) on the Appellate Court's "finding" that the final, but by no means total, predatory means to eliminate petitioners from a lucrative industry were carried out pursuant to "direction" from a government agent (who admittedly was completely dependent upon the two private companies controlling 100% of the market) and petitioners' property is thereafter turned

over to one of the monopolists (which made exorbitant profits from its vanadium and uraniuin ore), all in the face of the Appellate Court's acknowledgment:

(a) that the two monopolists controlled the industry pursuant to a deliberate (and successful) comprehensive scheme to dominate the total industry;

(b) that petitioners were the intended victims along with many other independents of respondents' scheme to monopolize the industry;

(c) that private acts, amounting to antitrust violations without government involvement, weakened petitioners to the point where the final blow (at the alleged "direction" of the government) might have been ineffectual to deprive petitioners of their properties;

(d) that the "government" in this case was actually a wholly owned subsidiary of Union Carbide, acquiring properties containing uranium at the "direction" of an army officer who admittedly was "just a geologist" without any knowledge of the Colorado plateau; and

(e) that the elimination of petitioners was accomplished pursuant to an admitted plan of respondents "to keep these claims from becoming the nucleus for the maintenance of a vanadium mill operated by outsiders" to the conspiracy.

7. Whether petitioners, who were awarded a jury verdict in the amount of $200,000 before trebling were deprived of a trial by jury by the Appellate Court below which reversed the jury verdict by weighing the evidence,

making factual rulings on the sufficiency of evidence of causation, not viewing the evidence as a whole, not allowing petitioners the benefit of all their evidence, not allowing petitioners the benefit of all inferences and presumptions to be drawn from the evidence, and not resolving all conflicts in the evidence in favor of petitioners in direct conflict with this Court's opinion in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 4 of the Clayton Act, 15 U.S.C. §15. These are printed and attached to this Petition as Appendix C, The antitrust exemption provisions of the Small Business Mobilization Act, June 11, 1942, C. 404, § 12, 56 Stat. 351 are attached hereto as Appendix D.

STATEMENT OF THE CASE

A. SUMMARY STATEMENT

This was one of five actions filed by various plaintiffs in the United States District Court for the District of Utah to recover treble damages under the anti-trust laws.

Petitioners herein were experienced mining operators and pioneers in the vanadium-uranium business. They were established miners and potential millers of vanadium products. (Pl. Ex. 118, R. 1308; Pl. Ex. 119, R. 1310.) Mr. Charles Curran, a graduate mining engineer, was originally in the group that operated United States Vanadium Company, which was eventually purchased by Union Carbide,

one of the respondents herein. (Pl. Ex. 119; R. 1296; 1311-1316.) Mr. John F. Wade operated a trading post in New Mexico (Pl. Ex. 124; R. 1324.) Mr. Thomas F. V. Curran was a metallurgist from Pittsburgh and an experienced businessman. (Pl. Ex. 119; R. 1310.) The Curran Brothers were dead at the time of the trial.

Petitioners claimed that they were driven out of the vanadium business and forced to sell valuable mining claims on the Colorado Plateau for grossly inadequate consideration by reason of respondents' violations of the antitrust laws. They claimed that they were victims of an overall conspiracy to monopolize the vanadium industry and that this conspiracy eliminated them from their business as miners, developers and potential millers of vanadium products. (R. 239-240.)

The defendants-respondents are the same as those involved in the case now pending before this Honorable Court in *Continental Ore Company, et al. v. Union Carbide and Carbon Corporation, Vanadium Corporation of America, et al.*, October Term, 1961, No. 304. The conspiracy to monopolize the vanadium industry involved here is the same conspiracy to monopolize involved in the said *Continental Ore* case.

Briefly stated, then, this case involved the inability of John F. Wade, Charles Curran and Thomas F. V. Curran, to remain in the vanadium business as a successful mining venture and expectant milling venture after developing and operating valuable vanadium-uranium mining claims during the period 1940 to 1944 on Navajo Council lands in Arizona.

The true value of their discovery and explorations, involving more than 168 square miles of land in the Carrizo mountains and valuable uranium potentials was never known to Wade and the Currans. The discoveries of the petitioners in this mountain area were made known to employees of USV who did know their uranium values. USV in exchange for $4,000 became a ⅓ partner with Wade and Curran on a 168 square mile exploration lease which was reduced to a 900 acre mineral right lease. The remaining one-third was acquired by Union Mines Development Corporation, a wholly owned subsidiary of Union Carbide. Union Mines then transferred the entire interests in the leases to the Manhattan District for their uranium values. The petitioners were paid $12,500 (in addition to the $4,000), but the properties involved were rich in terms of uranium as well as vanadium values. Since 1948, respondent VCA has extracted over $600,000 in uranium from these lands. (R. 1402.) The general testimony to the Wade and Curran action is set forth at R. 1289-1458; 1521-1581; 1581-1633; 1655-1678.

There was substantial evidence that the financial weakening of petitioners was the direct result of respondents' wrongful acts committed pursuant to the common objective of eliminating the Wade and Curran mining ventures from competition, as others were to be eliminated. That the Manhattan District allowed Union Mines to explore for promising uranium land and to purchase uranium lands as "free market" buyers became a significant factor in the manner in which the elimination of Wade and Curran occurred. But the substantial evidence was that the uranium properties of financially strong parties such as

respondents were not acquired by the Manhattan District and the Manhattan District clearly did not sponsor or know of the respondents' combination and purpose to gain and maintain a monopoly control over the Colorado Plateau. The respondents took the defense of governmental direction and presented evidence of their contracts and relations with the Manhattan District to the jury. The trial Court rendered appropriate conspiracy to monopolize instructions. (R. 3177-3202.) The jury found that petitioners had been injured as a proximate result of respondents' conspiracy to monopolize the vanadium industry and awarded petitioners the sum of $200,000. (R. 299-300.) The learned Court below, while sustaining other judgments, reversed the judgment entered in the above action on the jury verdict.

B. THE TRIAL AND APPEAL

Five separate actions were filed against respondents in the Utah District Court by persons who claimed they were injured by respondents' overall conspiracy to monopolize every phase of the vanadium industry. The five actions filed against respondents were:

1. *Frank J. Nisley, Jr., et al. v. Union Carbide and Carbon Corporation, et al.*, hereinafter referred to as the *Nisley* action. This action involved an independent mill which claimed that it was eliminated from the vanadium industry by respondents' conspiracy to monopolize the complete vanadium industry.

2. *Louis C. Ackermann v. Union Carbide & Carbon Corporation, et al.*, hereinafter referred to as the *Acker-*

mium action. This action involved another independent mill which claimed that it was eliminated from the vanadium industry by this same conspiracy.

3. *Continental Ore Company v. Union Carbide & Carbon Corporation, et al.*, which involved distributors and agents in the alloy metals business who alleged that they were eliminated from the vanadium industry by the same conspiracy.

4. *Howard A. Balsley, et al. v. Union Carbide and Carbon Corporation, et al.* This case was filed by 36 individual miners who mined and sold carnotite ore containing both vanadium and uranium to respondents. These individuals prospected, located and mined claims containing the valuable ore on the Colorado Plateau and otherwise sold vanadium-uranium ores to respondents. In their action they claimed that they were injured as a result of respondents' conspiracy which, as one of its facets, involved the fixing of the prices paid to these miners for the ore they sold respondents.

In addition, in this action, as Count Two of their Complaint, these 36 individual miners filed a class action on behalf of the class of miners similarly situated.

5. *John F. Wade, et al. v. Union Carbide & Carbon Corporation*, the case with which we are concerned in this Petition. This case is known as the *Wade and Curran* case.

Proceedings in the *Continental Ore* case were stayed by order of the Tenth Circuit because this company had filed a similar action in the United States District Court for the Northern Division of California, Southern District.

The California case resulted in a jury verdict in favor of respondents. The judgment entered on said verdict was affirmed by the Ninth Circuit Court of Appeals. *Continental Ore Co. v. Union Carbide and Carbon Corp.* (9 Cir. 1961), 289 F. 2d 86. This Court granted certiorari on October 23, 1961, limiting the certiorari to certain specific issues. One of these issues was whether these same respondents, as part of this same overall conspiracy to eliminate all competition from the vanadium industry, could utilize a wholly owned Canadian subsidiary which had been given a discretionary power by the Canadian government to allocate the importation of vanadium into Canada during the war to exclude the Continental Ore Company from the Canadian market and prevent it from shipping its products to its Canadian customers.

That issue is almost identical to one of the principal questions involved in this case. While the *Continental Ore* case involved the use of a Canadian governmental agency to further respondents' conspiratorial and monopolistic purposes, the instant case involves the use of an American governmental agency power to exclude another vanadium business.

The remaining four Utah District Court actions were consolidated for trial before a jury. After a six-week trial in which voluminous evidence was introduced, the jury returned unanimous verdicts in favor of plaintiffs in the *Nisley* action (R. 215); in favor of defendants in the *Ackermann* action; in favor of the individually named plaintiffs in Count One of the *Balsley* action (R. 409-410); and in favor of the plaintiff class in Count Two of the *Balsley* action. (R. 408.)

The complaint herein was filed on June 2, 1958. (R. 241.) The trial on the four consolidated cases commenced on November 2, 1959. The jury returned its verdicts on December 12, 1959. The transcript covered 4,500 pages. The trial lasted six weeks. In the consolidated trials, plaintiffs, one of them being petitioners herein, introduced 264 exhibits and respondents introduced 230 exhibits. As stated above, on December 12, 1959, the jury returned a verdict in favor of petitioners in the sum of $200,000. This was trebled by the Court and judgment was entered thereon on December 18, 1959. (R. 299-300.)

Respondents appealed from the judgments in the *Nisley* action, the *Wade and Curran* action and the *Balsley* action. They also received permission from the Tenth Circuit to file an Interlocutory appeal from an order entered after the verdict for the class in the *Balsley* class action. Mr. Ackermann, who had retired to Europe prior to the trial, did not appeal the adverse judgment against him.

On appeal, on December 27, 1961, the Tenth Circuit expressly and specifically found that there was an overall conspiracy to monopolize the vanadium industry and to exclude all competition by respondents. It substantially affirmed the *Balsley* action, the *Nisley* action and the Class Action. However, it reversed the judgment in favor of Petitioners. (See Opinion, Appendix A.)

Petitions for a Rehearing were filed by respondents in the *Balsley, Nisley* and Class Actions. Petitioners herein did not file a Petition for Rehearing in the Tenth Circuit in the *Wade and Curran* case. The Petitions for Rehearing filed by respondents in the *Balsley, Nisley* and Class Actions have not yet been ruled on by the Tenth Circuit.

In reversing the jury verdict and judgment in favor of Petitioners *(Wade and Curran)*, the Tenth Circuit ruled that the acquisition of the *Wade and Curran* properties was directed by the United States Government. It found that whereas in the *Nisley* action, the respondent-conspirators possessed and were conclusively found to have taken advantage of their position as governmental agents to their wrongful ends, in the *Wade and Curran* case respondents, although found to be confessed conspirators and violators of the antitrust laws by the Appellate Court, lacked the power to commit the acts of which they were accused by petitioners because of the "positive intervention" of government action. In reaching this different result in the two cases, this Court stated that in the *Nisley* case respondents, as governmental agents, had "discretion" in their activities and the power to "enfeeble" intended victims, while in the case at bar, this "enfeebling" and the predatory acts which led to petitioners' loss of valuable claims were the result of "positive intervention of governmental action".

In its opinion, the Court of Appeals for the Tenth Circuit agreed with the jury that an overall conspiracy to monopolize existed in the vanadium industry and found that respondents did conspire to monopolize the vanadium industry at all its levels, did conspire to eliminate independent mills, such as the Nisley mill, and did conspire to fix prices as part of that overall conspiracy.

C. EVIDENCE OF CONSPIRACY TO MONOPOLIZE

(1) INTRODUCTION

To fully understand the *Wade and Curran* case and the manner in which petitioners were injured by the overall conspiracy to monopolize which the jury and the Court below found to be a fact it will be necessary to set forth the statement of the overall conspiracy. We deem it necessary to present the statement of the overall conspiracy because the acts which injured petitioners herein constituted but a phase of the overall conspiracy.

(2) CONTROL OF THE VANADIUM INDUSTRY

At all times relevant here, respondents controlled the mining, manufacture, and sale of vanadium ore, vanadium oxide and ferrovanadium, every individual phase of the vanadium industry.

(a) Ferrovanadium

Respondents produced and sold almost 100% of the ferrovanadium in the United States during the period 1938-1958. (Pl. Ex. 9, 10; R. 583-584; Pl. Ex. 160; R. 1454.) The only competitor to respondents in the sale of ferrovanadium was the Continental Ore Corporation for a short period from 1940 to 1942, but it also was eliminated as a competitor. (Pl. Exs. 79-82; R. 1167-1170.) Although during the period 1938 to 1945 Union Carbide produced approximately 77% of the domestic vanadium oxide from which ferrovanadium is produced (Pl. Ex. 4; R. 578); it was its principal competitor, VCA, which sold approximately two-thirds of the finished product, ferrovanadium (Pl. Ex. 5, 10, 160; R. 579, 584, 1455).

Prices for ferrovanadium, the finished product, have always been uniform for each company during the period 1934 to 1958. From 1934 to 1947 they were $2.70, $2.80 and $2.90. Thereafter there were uniform increases. As late as October 1, 1956 the prices for both companies were uniformly increased to $3.20 and $3.30 and $3.40. (Pl. Ex. 10, 12.)

Ninety-nine percent of all the ferrovanadium contracts in the steel industry, which is the prime user of ferrovanadium, were based on requirement contracts with respondents, either on a 100% basis or a shared percentage. (R. 1703?) This automatically excluded dealing with any other firm during the contract period.

(b) Vanadium Oxide

Respondents controlled over 90% of the vanadium oxide produced in the United States. (Pl. Ex. 3, 4, 5; R. 576-579.) Respondents' mills on the Colorado Plateau accounted for over 90% of the domestic production of vanadium oxide. (Pl. Ex. 3; R. 576-578.) At various times, small independent mills attempted to start an operation on the Colorado Plateau but they were systematically eliminated by respondents, so that by 1944 respondents were the only producers of vanadium oxide on the Colorado Plateau. (Pl. Ex. 3, 4.) At the consolidated trials, plaintiffs produced substantial evidence that these independent mills were unable to operate because respondents, as part of their conspiracy to monopolize the entire vanadium industry, deliberately sought to and successfully did eliminate them as competitive vanadium oxide millers or producers. (R. 674-676; 714-719.)

Even the production of those who produced vanadium oxide only as a by-product was purchased by Union Carbide specifically "to keep it off the market". (Burwell R. 664-669.)

Domestic prices for vanadium oxide by each respondent have been uniformly $1.10 per pound of V_2O_5 until 1947. After 1947, prices were adopted by respondents as follows (Pl. Ex. 11, 12; R. 584: per pound V_2O_5):

Union Carbide		VCA	
(Contract prices—any quantity)		(Contract prices—any quantity)	
10/ 1/47	$1.20		$1.20
10/ 1/48	1.20	1/ 1/48	1.20
(Contract less than carload)			
11/10/50	1.28	11/15/50	1.28
		(Ton lots, less than ton lots)	
10/ 1/55	1.33	10/ 1/55	1.33
10/ 1/56	1.38	10/ 1/56	1.38

(c) Vanadium Ore

Approximately 91% of all the combined ore milled by respondents came from their own properties. (Pl. Ex. 255, 256; R. 2740-1; USV 91%; VCA 70%.)

Ore prices paid to miners have been substantially identical for both respondents. Both respondents adopted an identical price based on 2% vanadium content. (R. 641-644.)

During the period October, 1938 to June, 1942, the price paid the miners was 21 cents a pound for 2% ore. (Pl. Ex. 25; R. 589-91; Pl. Ex. 47; R. 1007.)

After June, 1942, respondents paid the miners 31 cents a pound for 2% ore. (Id.)

The miners had no dependable alternative markets for the sale of the average grade of carnotite ore which they mined on the Colorado Plateau. Vitro Company, through its agent, Howard Balsley, was buying *only* some high grade carnotite ore, 15% U_3O_8, 5% V_2O_5, which was used for ceramic purposes. (R. 2589; Pl. Ex. 118, 200; R. 1308, 1922.) The few independent oxide mills that were started to give the miners a possible competitive outlet were eventually eliminated from competition by respondents, as will be pointed out in detail hereinafter. And when the opportunity arose for the independent miners to acquire the Durango and Monticello Mills after the war, these were acquired by respondents specifically to prevent independent operators from acquiring them. (Pl. Ex. 13; R. 585; Pl. Ex. 14; R. 585; Pl. Ex. 136; R. 1357; Pl. Ex. 137; R. 1358; Pl. Ex. 36; R. 709-710.)

(d). Uranium—By-Product of Vanadium

As a necessary result of the control of the oxide mills, respondents were also in control of the Colorado Plateau and its uranium potential during the war and until the Atomic Energy Commission started its successful guarantee program in or about March, 1951. (VCA-20, R. 2011; and see R. 1731-1735.)

Physically and chemically the vanadium industry encompassed the element uranium, since the carnotite ore found on the Colorado Plateau contained both elements. The two elements are contained in the same ore. Vanadium cannot be treated or discussed without considering uranium. The raw ore could be milled for vanadium content or its uranium content or both. Thus, the conspiracy to control and dominate the vanadium industry by respond-

ents necessarily included a control of uranium as well. The record shows that respondents' exclusionary conspiracy resulted in almost total ownership and control by respondents of the principal carnotite ore deposits on the Colorado Plateau, the mills producing the oxide from the ore and the sale of the finished ferrovanadium. As a result of their experience in the milling and treatment of carnotite ores, respondents were called upon by the Government to produce uranium oxides, erect uranium mills, and acquire carnotite properties for the war effort. (UC 4, R. 772; UC 5, R. 775; R. 1812-1813; UC 17, R. 797; R. 796-817.) Respondents however utilized this national emergency to further the existing conspiracy and to acquire control of the "rich prize, one of the greatest mineral resources of all time", the "trickle of money" that "would become a river of money later on". (Burwell R. 616.)

Because of their position in the dawn of the uranium era during the period 1938 to 1948, respondents became the basic private contractors in the development of uranium. Respondents' control of the uranium industry was a continuation of the existing conspiracy and a necessary result of the primary control of the milling of vanadium oxide.

(3) REVIEW OF THE EVIDENCE

(a) Genesis of Conspiracy to Monopolize

Prior to 1927, VCA was the dominant producer of vanadium in the world, securing all its vanadium ore supply from a mine in Peru. (R. 600.)

Union Carbide entered the vanadium business in 1927 when it acquired the mining operations of the United States Vanadium Company, which was producing vanadium oxide at Rifle, Colorado. (R. 598.) The mining installations of this company had been designed and installed by Blair Burwell.[1] (R. 598.) Burwell was employed as mining engineer by USV and placed in charge of all the company's mining operations on the Colorado Plateau. (R. 598-599.) Prior to this time, neither Union Carbide nor any of its subsidiaries had been in the vanadium business. (R. 599.)

Union Carbide wholly owned the stock of USV and treated it as a division or unit of the large Carbide family. Union Carbide serviced these units and tightly con-

[1]Without any doubt Blair Burwell was the most informed man on vanadium and uranium in the Colorado Plateau. He was Union Carbide's principal managing agent on the Colorado Plateau and there are few transactions mentioned in this brief in which he was not the prime actor and controlling influence. He was vice-president of Union Carbide's subsidiary, U.S.V.; a Director of U.S.V.; Assistant to the Vice President in Charge of U.S.V.'s mining operations; an Engineer whose specialty was radium, vanadium and uranium; a Consultant for the Atomic Energy Commission; the Appraiser for the United States on the Colorado Plateau for the valuation of vanadium lands; Vice-President of Union Mines Development Corp.; he conducted special studies, surveys and appraisals of mineral resources in the United States for Union Carbide; a Director of the Metal Mining Fund of the State of Colorado; a writer of technical texts on mining; Chairman of the Board of Mineral Engineering Co.; Director of the Climax Uranium Co. He has been actively engaged in mining on the Colorado Plateau since 1919. (R. 594-595, 603.) For his extensive experience in uranium see R. 731-733.

trolled their budgets. (R. 603-605, 2117.) Carbide's directors or officers determined the basic policy of these units. (Id. and R. 687-694.)

Union Carbide's decision to enter the vanadium field was reached only after a thorough investigation of the vanadium situation conducted at the request of its top executive officers. (R. 599-603.) Prior to his employment by Carbide's USV, Burwell had been consulted as to the nature, quantity and quality of ore deposits on the Colorado Plateau and their ability to supply sufficient vanadium to justify Union Carbide's entering the vanadium business and developing the uses of vanadium as an alloy metal. (R. 599-601.) Mr. Van Fleet of USV was sent on a secret mission to Peru to inspect VCA's Peruvian mine in order to determine VCA's Peruvian ore reserves and the mine's ability to produce sufficient vanadium to supply the then anticipated needs for vanadium in the growing engineering steel market. (R. 600-601.) Burwell reported that the Colorado Plateau ore deposits were more than sufficient to support a domestic vanadium production. (R. 600.) Van Fleet reported that within a period of five years VCA's Peruvian ore would not be able to compete price-wise with Colorado Plateau ore because the depletion of the Peruvian mine's high grade ores would bring about increased production costs. (R. 600-603.) Based on these reports, Union Carbide authorized Burwell to purchase extensive vanadium properties on the Plateau and Union Carbide entered the vanadium industry in 1927. (R. 602.)

The reason Union Carbide entered the vanadium business in 1927 was that Union Carbide anticipated that the

price of ferrovanadium could be lowered and that both vanadium oxide and ferrovanadium could be produced from domestic ores at a profit, so as to make vanadium a major engineering alloy in Carbide's family of products, support a successful independent vanadium business and compete effectively with other alloy metals. (R. 600-603.) Instead of proceeding with this policy, Union Carbide entered into a conspiratorial agreement with VCA whereby VCA would be allowed to remain in the vanadium field as a controlled competitor, and together they would monopolize the entire field. (R. 606.)

The price of vanadium was not cut, as originally contemplated, so as to take VCA's market because an agreement between VCA and Carbide Electromet had been made to maintain the price of vanadium oxide and ferrovanadium. (Burwell R. 606-615.)[2] The agreement made between the two respondents provided that VCA was to be established as the competitor of Electromet in the ferrochrome business in order to forestall possible antitrust action which might come up in the future if Electromet were the only producer of the ferrochrome. (Burwell R.

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[2]Burwell testified that ". . . it had been decided not to cut the price of vanadium and take the markets because such action would put the Vanadium Corporation out of business." (R. 606.) "I to my satisfaction, to the best of my knowledge, knew that there was an agreement between the Vanadium Corporation of America and the United States Electro Metallurgical Company which restricted . . ." (R. 611.) ": . . we were well aware at that time we were restricted in our sales in this country." (R. 610.) "We couldn't [reduce the price of vanadium] because there was an agreement between these two companies, to the best of my knowledge, that prevented us from reducing the price of vanadium and ferrovanadium and we continued to sell vanadium oxide to the Vanadium Corporation of America. Instead of cutting the price on our huge output to stimulate production in Colorado . . ." (R. 614-615.)

672-673.) In return for being set up as a controlled competitor in ferrochrome, VCA was to be allowed to maintain its vanadium markets and set the price for vanadium without price cutting or competition by the Union Carbide group of companies. (Burwell R. 673; 682-683.)[3] Therefore, the price of vanadium was not cut. Union Carbide "didn't want the Vanadium Corporation put out of business for reasons of connections that had been made with Vanadium Corporation in regard to the sales of low-carbon ferrochrome." (Burwell R. 606.)

Consequently, pursuant to this conspiracy, the oxide produced by USV at Rifle was not sold in the market in accordance with the "policy understanding of 1927" but instead it was stored at Rifle. (R. 606.)

At this time, VCA was still entirely dependent on its Peruvian mine for all its vanadium ore and USV was the sole producer of vanadium from domestic ore.

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[3]Burwell testified that "[Gormely] told me that Vanadium Corporation of America had been established as a friendly competitor to sell low carbon ferrochrome in the United States, and the reason for that was to forestall antitrust action that might come in the future. That was on the advice of the attorneys at the time." (R. 672-673.) ". . . they had decided to set up the Vanadium Corporation as a competitor of low carbon ferrochrome, and they had, therefore, made the arrangements with the Vanadium Corporation of America, for them to resell low-carbon ferrochrome and, therefore, avoid any questions about the Electro Metallurgical Company being the sole producer of the low-carbon ferrochrome . . . Vanadium Corporation . . . requested in return for their being established as a reseller of low-carbon ferrochrome that they would not be disturbed or put in competition by the low cost vanadium of the United States Vanadium Corporation, and that they would then have all the vanadium, that they would set the market, make the price, and that the United States Vanadium Corporation, Electro Metallurgical Company, and Electro Metallurgical Sales would not cut the price of vanadium to the point that had been contemplated before. And they did." (R. 682-683.)

Instead of competing with each other, VCA and Union Carbide entered collusive arrangements whereby, in 1933, Union Carbide supplied its "competitor" VCA with 1,000,000 pounds of vanadium oxide at 30 cents below the market price. (Pl. Ex. 6, contract dated September 15, 1933, Burwell. R. 579-580; 613.) In addition, commencing in 1933, the top executive officers of the Union Carbide group of companies discussed entering into negotiations for a single joint operation with VCA at Naturita. Thereafter, meetings were held between VCA and USV officers relating to the purchase of claims, costs, production, sources of ore and the VCA mill. (Pl. Exs. 26, R. 620; 54, R. 1078; 55, R. 1082; 56, R. 1085; 57, 1089; 58, R. 1090; 59, R. 1090; 60, 1091.)

Direct documentary evidence, of the type seldom if ever found in anti-trust cases, was introduced at the trial demonstrating the intimate cooperation and working arrangements between VCA and the Union Carbide group of companies, fully corroborating Burwell. For example:

Pl. 26: A letter dated December 22, 1933, from Mr. Burwell to his superior, Mr. Van Fleet, which provides in part:

"Following our last discussion on the matter in which you brought up the question of the adaptability of the Vanadium Corporation of America to an enlarged scheme of operation, it has seemed to me necessary that we should bring our ideas together to decide what will be the most economical and up to date plant of a large capacity, in its treatment features, and if we can fit the Vanadium Corporation plant into such a scheme of things without the sacrifice of good design and operation. I know that this is your idea."

Pl. 53: Memorandum dated March 13, 1934, from Charles Rees (VCA) to his superior, A. A. Corey, Jr.:

"Mr. Van Fleet was in today and said he wished to discuss the possibility of making some sort of an arrangement whereby a Vanadium operation could be started in the Paradox Valley where our Metal properties are situated."

"Negotiations have been carried on with the Vanadium Corporation of America for procuring their Rare Metals plant at Naturita in the Paradox Valley . . ."

* * * * *

Pl. 54: Letter dated April 5, 1934, from Van Fleet to Gormely:

"As yet, the Vanadium Corporation of America has not signified their intention to continue purchasing oxide from us, nor have they placed a valuation on their plant. They have indicated that they do not wish to be 'out of the picture' in the Paradox Valley. So far, I have offered two proposals for discussion, and the Vanadium Corporation has offered one. The proposals I have made depend entirely upon whether the Vanadium Corporation will continue to purchase oxide. The amount has been variously discussed at from 3,000,000 to 5,000,000 pounds over a period not to exceed five (5) years. The tentative price offered was ninety cents (90¢) per pound V_2O_5."

(There then follows a complete discussion of the three proposals.)

Pl. 56: Letter from Van Fleet to Blair Burwell dated June 6, 1934:

"I had a long talk with Mr. Gormely yesterday about the plants in the Paradox Valley. It appears that the Vanadium Corporation of America is going to be very much disappointed if we do not make some kind of an

arrangement with them for using their plant and supplying them with a considerable amount of V_2O_5. . . ."

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"I called Mr. Reis of the Vanadium Corporation on the telephone this morning and he was much interested in the outcome of my visit to the Paradox. I told him, frankly, that we are making a complete study of the whole situation. . . . I, also, asked permission to have access to their plant so that we could make our drawings and estimates for its reconstruction. The permission will, undoubtedly, be forthcoming but he said he would have to speak to Mr. Corey about it."

Pl. 57: Letter from Charles Rees, Vice President VCA, to Robert Sterling, VCA, dated June 6, 1934:
"We have had several discussions with their Van Fleet during the past three or four months on the subject of joining our properties and plant in the Paradox Valley with their holdings on a mutual operating basis by which each party is to retain unimpaired titles to their holdings. If we come to an arrangement as to conditions and method of operation, one party to the agreement will be selected as the operator and the non-operating member will be represented by an agent to protect its interests."

Pl. 58: Letter from Van Fleet of USV to Charles Rees, Vice-President of VCA, dated July 10, 1934:
"Mr. Sterling furnished Mr. Burwell with plans, and drawings and estimates are now being made for the rearrangement to suit our processes. I will be very glad to advise you when this work is completed."

The negotiations for a joint operation went so far as to allow USV officials to inspect VCA's Naturita plant, its makeup, its equipment and cost of doing business. (Pl. Ex. 56, 57, 58 and 59.)

In 1934, *both* companies simultaneously raised their ferrovanadium prices of $2.60 (open hearth), $2.70 (Crucible), $2.80 (Prime), to identical prices of $2.70, $2.80, $2.90. (Pl. Ex. 10; R. 584; VCA p. 4, UC p. 6.) This price increase was made even though Electromet had a tremendous surplus (UC 127; 2207-2208) and VCA was importing its ore from Peru or purchasing all its oxide from USV and, by necessity, had different costs of production. And despite World War II and the numerous economic upheavals occurring between 1934 and 1947 these ferrovanadium prices remained *unchanged* and *identical* for *both* companies from 1934 to 1947. (Pl. Ex. 10.)

On July 26, 1934, after a comprehensive economic study of the proposed joint operation and a complete analysis of VCA's Naturita plant, its costs, advantages and disadvantages, Burwell recommended that the most economical method of handling the joint arrangement was to construct a new plant at Uravan, Colorado, in the Paradox Valley. (Pl. Ex. 59.) This plant was built by USV for the purpose of supplying VCA, its competitor, with oxide. (Burwell R. 607.)

At this time, Union Carbide became apprehensive about the vanadium situation, so the Union Carbide and Carbon Research Laboratories, Inc. was authorized to prepare a complete survey and special report on vanadium. (R. 628-629.)

In June, 1935, C. E. MacQuigg, an officer in the Research organization, issued a "Special Report on Vanadium". (Pl. Ex. 27.) This report was prepared after thorough consultation with Mr. Van Fleet and other top Carbide officials. (Pl. Ex. 27, pages 2, 35, 54-61; R. 630.)

The alternatives presented by MacQuigg are set forth in Pl. Ex. 27, pp. 36-38.[4]

[4]The MacQuigg report provided:

"As an indication of what business might be expected in case we decided to cut the price to such an extent that competition in this country were practically eliminated *(or by other means such as agreements)* and we sold all of the vanadium, three possible assumptions are presented:

I. We get all of the business in vanadium, but due to the recent trend and in spite of research and development it continues to decline, and therefore in a few years there is little demand for the metal. This assumption is rejected as most unlikely.

II. Business remains the same, but we produce practically all of the vanadium. On the basis of roughly 1,000,000 lbs of vanadium consumed annually, our profit at 84¢ ($2.10 – $1.26) would be $1,141,335 as against a past and present profit of around $297,199 per year ($1.00 × 297,199). From the gross profits, we would have to deduct the cost of research and development mentioned later—a total of some $300,000 over a period of three to five years. Even so, the margin of profit is quite attractive, say, in the neighborhood of $1,141,335 – $100,000 = $1,041,335 for three years, and after that time possibly larger, depending on the demand.

III. Prices are cut still further so that our profit is only 50¢ per lb. (i.e., vanadium sells at $1.76). This reduction in price with the results of our research and development programs, so boosts the consumption of vanadium that the sale is increased to 2,000,000 lbs. per annum. The net profit is still the same as under Assumption II. Some additional advantages might be obtained, as for example those resulting from a new deoxidizer which might use vanadium in large quantities, and while we might make only 50¢ on the contained vanadium we would make a profit on the other elements. Patent protection on such an alloy would be highly advantageous if the alloy had exceptional merit; it is not fanciful to assume such possibilities.

Several conclusions are possible regarding the course that may be indicated by the facts noted in this report, and these may be summarized as follows:

Possible Action	Favorable Results	Unfavorable Results
Take no aggressive action, *but continue to let VCA dominate the market and we sell to them—predicated on a continuation of their patronage.*	a. We take no risk on ill will or *a possible disturbance of the "status quo" in other fields.* b. We will sell the bulk of the vanadium, *with no stimulated competition.*	a. There is no indication that such a policy will do other than kill all of the disappearing vanadium market, after which there will be no business for anyone. b. If matters are allowed to drift as at present, the vanadium business will continue to disappear and the VCA will in time be defunct or at least moribund, thus forcing them into the hands of the present holders of a substantial portion of their bonded indebtedness, *and the latter interests may be expected to make the most of the situation in the whole alloy field.*
I. We sell to VCA *but compel them to take an aggressive attitude* toward stimulating the waning demand for vanadium.	a. *Will avoid friction with the VCA, thus minimizing their entry into stronger competition with us in other alloys, e.g., silicon and chromium.* b. VCA competition would be most serious in chromium, and it is doubtful if they could menace us without ample supplies of ores. *Any mutual agreements would not be jeopardized by this arrangement.* c. The VCA will probably be no sharper a competitor than at present *and if they are absorbed by A.R.Co., they will most likely get "tough" anyway.*	a. *This ties our hands and prevents us from obtaining the bulk of the business through research and development.*
II. *We set our own lowered price* and by an energetic campaign, we eliminate VCA from the field.	a. We can dominate the market and obtain the bulk of the business by virtue of our better economic position and ore supplies. b. We have a free rein to develop new markets and peg the declining use of vanadium. c. *We can eliminate VCA as a desirable adjunct to our competitor in other fields.*	a. We give every cause for retaliation from VCA and one of their large bondholders who would seek every opportunity to thwart us in any possible way. b. *Competition would be engendered needlessly* because of the chance that vanadium as a major steel-making element is done for.

(Emphasis supplied.)

After issuance of this report, Carbide executives discussed which of the alternatives suggested by MacQuigg were to be adopted. (Pl. Ex. 62, 63, 64; R. 629-630.) One of these alternatives was that "we set our own lowered price and by an energetic campaign we eliminate VCA from the field". (Pl. Ex. 27, p. 38, proposal III.) VCA naturally became apprehensive about its ore supply and had its vice-president, Mr. Rees, talk to Mr. Price of Electromet Sales "with reference to the new contract for oxide". (Pl. Ex. 66; R. 1103.) Mr. Price of Electromet Sales told him they preferred to wait "before talking price" as the price would be dependent upon the price of ferrovanadium (Pl. Ex. 66) and that the speed with which USV could proceed at Uravan was dependent on the amount of oxide which USV had to "earmark". (Pl. Ex. 66.) At the time these negotiations between USV and VCA were taking place, Mr. Van Fleet reported to the Union Carbide executives that the price of ferrovanadium could be dropped from $2.70 to $2.00 and still make a profit. (Pl. Ex. 75; R. 1122; the chart attached to the exhibit is discussed at R. 2960-2962.) Mr. Van Fleet's recommendations were not accepted and on January 3, 1936, Electromet Sales entered into another contract with VCA whereby 250,000-375,000 lbs. of oxide were sold to VCA at 80¢ per pound or 30¢ below the market price. (Pl. Ex. 70; R. 1114.)

On March 25, 1936, Van Fleet wrote to Mr. Gormely:

> "On Monday I had a talk with Mr. Bransome and Mr. Rees of the Vanadium Corporation of America in reference to the purchase of some equipment now at their Naturita Plant for use in our Paradox Valley Plant at Uravan. Previous conversations in regard

to the use of Naturita Plant were reviewed by Mr. Rees and myself for the benefit of Mr. Bransome." (Pl. Ex. 72, R. 1115.)

In this letter, Mr. Van Fleet reported a complete discussion between VCA and Carbide of their most intimate costs and production figures. It must be remembered that these are the two chief managing agents of the respective companies controlling 100% of ferrovanadium production and sales. (Pl. Ex. 72.) The letter includes the following:

"The discussion then turned to the vanadium situation in general. Mr. Bransome stated a reduction in price of V in ferrovanadium is indicated, but that a small reduction would do no good; and that their cost of producing vanadium was so high a considerable reduction could not be made. I asked him what he thought would be a 'considerable reduction' and he said to $2.25 or $2.10 per pound. He went on to say that with the fused oxide costing him 80¢ per pound there was little profit in vanadium at the present prices. It developed when he was roughly casting up these figures, that in their present practice it requires 2.2 lbs. of V_2O_5 to make 1 lb. of V in ferro.

"Mr. Rees is the Vice President of the Vanadium Corporation of America, and a Mining Engineer. He is responsible for the Peruvian operation. He told Mr. Bransome that our costs at Rifle were between 60¢ and 70¢ per pound of V_2O_5 and assumed it as being 65¢. With this assumption he considered 80¢ per pound was about as cheap as we could be expected to sell fused oxide from our present stocks. I stated that the Rifle production was, probably, cheaper than the Peruvian production in any case, to which he made no reply.

"Mr. Bransome stated he believed in laying his cards on the table in regard to vanadium production, that he knew he could not fool us, and any other attitude would be foolish to take. He said when he found out what his costs were going to be in Peru, he believed it would be advantageous for all concerned to get together on one production operation. He said that by the time he was ready to discuss this situation he would, probably, know just what our costs would be at the Uravan Plant. Mr. Bransome asked what our costs at the Plant would be. I told him we were in no position to make any definite statement as to this cost at this time, because we were making some changes in the process and were not certain as to how these changes would affect the costs.

"Mr. Bransome stated many times that he was very anxious to reduce the cost of V_2O_5 production to a point where a considerable reduction in the sales price of V in FeV could be made. In this respect I said that there seemed to be a difference of opinion as to the advisability of reducing the sales price of vanadium as to its effect upon sales. Mr. Bransome said his contracts with the steel people seemed to indicate that a considerable reduction would stimulate the use of vanadium." (R. 1116-1118.)

In 1936, USV constructed its new oxide mill at Uravan in order to supply VCA with oxide. (Pl. Ex. 13; R. 585, 607.) It continued to supply VCA with the oxide necessary to make ferrovanadium. In mid-1938 the Uravan plant capacity was doubled to 1,500,000 lbs. *at the request of VCA* for the specific purpose of supplying additional vanadium to VCA. (R. 607.) The steel used to double the plant capacity was supplied by VCA. (R. 608.) The plant's capacity was doubled in spite of the fact that USV had a

surplus of oxide. (R. 669.) This collaboration at this point was between "competitors" who between them controlled 100% of ferrovanadium production and sales.

In 1938, since VCA did not take all the increased production, Burwell complained to Gormely that because of the high inventory, USV was faced with a shutdown of its mining operations. (R. 670.)[5] Burwell recommended that the price of vanadium be dropped so as to increase the demand for oxide. (R. 670.)

Mr. Gormely attempted to help and actually resorted to scheming to avoid the agreement between Union Carbide and VCA not to sell vanadium below the fixed price by attempting to devise a means of "selling vanadium into the consuming industry in some other form than ferrovanadium". (R. 671.) He discussed the problem with Union Carbide and Carbon Research Laboratories, which developed an alloy of silicon and vanadium called silvaz, which could be sold as a "cheaper method of putting vanadium into steel". (R. 670.) This silvaz was sold to test customers, but VCA soon complained that "there had been a breach of their understanding" and that silvaz

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[5] "I said why didn't we go ahead and cut the price of vanadium. I believed that the Vanadium Corporation of America could not produce vanadium at a price of $2.25 a pound and survive. Mr. Gormely said that would put the Vanadium Corporation out of business. I said 'all right, so you put them out of business. What is the difference? We have people down here working. The survival of our business, or the survival of the Vanadium Corporation business?' I said 'Where do our loyalties lie? Why don't we put the Vanadium Corporation out of business?' that is clear words.

"He said if we put the Vanadium Corporation out of business we would lose our controlled competition in ferrochrome. That is the cold words." (Burwell R. 672.)

was "simply a subterfuge or device to sell vanadium outside of their agreement." (R. 671-672; Pl. Ex. 262; R. 2776.) As a result, Electromet discontinued the production and sales of silvaz. (R. 671.)

(b) Elimination of Competition

Commencing in 1938, the war machines of the world were beginning to prepare for World War II. This rearmament gave a surge to the Plateau. Higher export prices stimulated entry into the vanadium business.

But USV learned of these intentions by "outsiders" and in September 1938, Van Fleet instructed Burwell to secure accurate and definite information on the Colorado Oxide Production (Pl. Ex. 29; R. 664) for the purpose of a report to the Board of Directors. (Burwell R. 675.) In this request, Van Fleet wrote (Pl. Ex. 29; R. 665):

> "As I discussed with you the other night on the telephone, it has become very important that we find out accurately and definitely who is producing vanadium ore and where it is going. Along with this, we want to know the quality of the ore shipped so that we can get a line on the pounds of V_2O_5. . . . We may have to do something about this production. . . . These are pretty high prices for us, but it may be necessary to finally do something about it.
>
> "I have an idea that this production of ore which is going to Europe and Japan is quite a quantity of V_2O_5. . . . I have been talking about this for some time here in New York, stating that the high prices maintained for V_2O_5 in Europe will invite and stimulate this kind of competition and can eventually support a considerable vanadium business, with possibly later on a plant."

Burwell acquired this competitive information and made a complete report to Van Fleet specifically so that Van Fleet could report it to the Board of Directors. (Burwell R. 675.) In his report to his superiors, on September 19, 1938, Van Fleet states (Pf. Ex. 30, p. 4; R. 674):

> "*We have already purchased two or three groups of claims which are potential producers and could be the nucleus of an operation.* The intensive development during the past year has made it more imperative to continue this policy and it now appears that we should purchase some properties and possibly install a small plant in Southeastern Utah *to forestall serious competition.* A definite recommendation will be made on this as soon as the field work has been finished." (Emphasis added.)

Soon after, the recommendation was transmitted to Mr. Burwell. (R. 675.) In his own words, the recommendation was:

> "Q. State whether or not there was in September of 1938 a communication from any superior of yours in the United States Vanadium Corporation or Union Carbide with respect to a policy on competitive activities on the Colorado Plateau.
>
> A. Yes, there was.
>
> Q. Was this an oral or a written communication to you?
>
> A. Oral.
>
> Q. And who gave you that oral communication?
>
> A. Mr. Van Fleet.
>
> Q. What was the policy as communicated to you?
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> A. Well, I was, *my instructions were to acquire all the properties on the Colorado Plateau that would*

possibly produce vanadium in competition with the United States Vanadium Corporation.

Q. To acquire them for what reason?

A. To keep them off the market as producers of vanadium.

Q. What market?

A. The American market." (Emphasis added.)

Accordingly Mr. Burwell set out to accomplish this purpose, to eliminate any independent competition or any source of ore that could nurture an independent vanadium business and to purchase or neutralize any *claims* that could possibly be used to challenge the monopoly. The following production was excluded:

Anaconda Copper Co.: USV agreed to purchase its entire yearly output, estimated at 100,000 lbs. yearly. (Pl. Ex. 30.) USV did not need vanadium oxide at this time. (R. 675.) Burwell testified he purchased its entire output only "to keep it off . . . the American market". (R. 675.)

Mammoth. St. Anthony: This mill had an appreciable production of vanadium in 1938. (Pl. Ex. 30.) Burwell testified that he negotiated to take over their production of oxide only for the reason of keeping it off the vanadium market. At this time USV had no need for vanadium oxide, could not sell vanadium, and was facing a shutdown because of a surplus of vanadium oxide. (R. 667.)

Mesa Vanadium Mill: (R. 715-717; Pl. Ex. 239, 240, R. 2565-2566.) This mill opened in 1939. (R. 716.) USV took over its operation though it did not need a mill. (R. 716.) Burwell took over the mill only "to keep it out

of production" (R. 716) and converted it into an ore buying station. (R. 717.)[6]

Loma Mill: (R. 717-719.) This mill started in 1940 in the Yellow Cat mining district area of Colorado. (R. 717.) Prior to the time it was opened, USV had not been purchasing ore in any area close to this independent mill. (R. 717.) After the mill started, USV commenced an ore buying station near the mill, although USV did not need ore at the time. (R. 717.) The buying station was set up specifically to keep the ore away from the Loma Mill. (R. 718.) The purchased ore was hauled 150 miles to the Uravan plant! (R. 718-719.) In spite of this additional hauling cost USV paid no more for the ore around the Loma Mill than it did for its ore at Uravan, which was only a 7 to 8 mile haul.[7] (R. 718.) This "mill closed down for lack of ore". (R. 718.)

Gateway Alloys: (R. 713-715; 2779-2780.) Gateway Alloys was a small independent mill which an individual named Brown leased from the Molybdenum Corporation of America. Burwell received specific instructions "to discourage them in any way we could". (R. 714.) Burwell offered Brown a low price for the oxide and then arranged to lease the surrounding claims. He then stripped these claims of 12,000 to 15,000 tons of easily accessible

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[6]The miners in this area were so desperate for an independent mill that the miners contributed their labor to help build it. (G. Reed R. 927-928.) After its close, the only outlet for the ore in this area was to respondents. (G. Reed R. 928.)

[7]The additional cost to haul the ore from the Loma area to Uravan was "five cents a ton-mile" or $7.50 a ton. (R. 719.) There was no hauling allowance of any type made to the miners in the Loma mill area and the price paid was 21¢, which was the same price paid miners for ore at Uravan. (R. 719.)

and, naturally, inexpensive-to-mine ore. (R. 714.)* To make doubly sure that the ore would not go to the independent mill, Burwell built a road which led away from the mill and down the other side of the mesa. (R. 2779.) At this same time USV had more than sufficient ore at its Uravan mill area and did not need the Gateway ore. Yet it hauled this ore 45 to 65 miles over rough roads from the Gateway area to Uravan. (R. 715.) The reason for this "costly haul" was that USV "wanted to keep another vanadium operation from getting started". (R. 715.) The mill went broke in 1940. (R. 715.)

Nisley and Wilson: This independent mill also closed down because of the activity of respondents. This operation was the subject of the *Nisley* action, in which the jury found that the mill had gone out of business because of the monopolistic and conspiratorial activities of respondents and awarded them $40,000 damages. The facts involving this mill are set out in some detail in the opinion of the Tenth Circuit Court of Appeals which affirmed the judgment. (Appendix A.) The mill closed in 1944. (R. 1176.)

Blanding Mines Co.: During the time that the mill was operating Burwell personally negotiated for their

*(Burwell R. 2779): "So all we did to help Mr. Brown out and offer to take care of the situation in controlling the district, which were my instructions and which I carried out, was to take all of the surface ore that was available that could be economically taken down to the Gateway plant, and to do that we built the road, not down to Gateway; we built a road up the other side, that went down to Mesa Creek . . . which was of no use to the Gateway plant, but over that road we cleaned up all the surface available ores on the claims that bordered the top of the mesa, so that when we were through we had all the available cheap ore that could possibly be used to implement a small plant."

oxide output. (R. 668.) At the time of these negotiations, USV did not need vanadium oxide. (R. 668.) The reason for negotiating for the oxide was that "we were controlling the output of vanadium, keeping it off the market." (R. 668.)

In 1941, Bransome (VCA) traveled to Los Angeles to meet with the owner of the mines, located adjacent to the mill, which supplied the mill and he bought these claims for VCA. (R. 1971-1972.) Much of the Blanding ore was then diverted to VCA's Monticello Mill. (R. 1972.) Prior to the time VCA acquired these claims, the Blanding output was being sent to Apex Smelting Co. (R. 1972), which was the supplier of vanadium for the Continental Ore Co. (Pl. Ex. 81; R. 1168.) After VCA got the claims, the oxide went to VCA. The mill eventually went out of business. (R. 1972.)

International Vanadium Mill (Pl. Ex. 30, p. 3; R. 674): Van Fleet and a USV field engineer made visits to the plant to sample the mine. (Pl. Ex. 30.) They were satisfied that within a short while the mill would fail and they would not have to worry about this mill. (Pl. Ex. 30.) The mill did fail. (R. 767.)

Apex Smelting Co.: This company commenced producing ferrovanadium in 1940. (Pl. Ex. 160; R. 1454.) It had a working arrangement with the Continental Ore Company whereby Continental was to handle ferrovanadium sales for Apex and secure vanadic acid supplies for Apex to produce the ferrovanadium. (Pl. Ex. 81; R. 1168.) VCA actively negotiated with Apex for its equipment and products to put it out of business while the Apex-Continental contract was in force, although Apex had a 14-year

contract with the Continental Ore Co. (Pl. Ex. 79, 80, 81, 82; R. 1167-1170.) Soon after VCA entered the scene, the Blanding Mines Company stopped sending oxide to Apex Smelting Company and it went to VCA. (Burwell R. 1972.) Soon after, Apex ceased making ferrovanadium. (Pl. Ex. 81, R. 1168.)

Continental Ore Co.: Continental Ore Co. sold ferrovanadium in competition with respondents. (Pl. Ex. 160; R. 1134-1135.) In 1942, through the direct intervention of VCA, it lost its relationship with Apex Smelting Co., and thereby its associate in the manufacture of ferrovanadium. (Pl. Ex. 82, R. 1170.)

In November 1943, Continental wrote to VCA (Pl. Ex. 206; letter dated 11-16-43) and to Electromet Sales (Pl. Ex. 207; letter dated 11-17-43) asking for a supply of 10,000 to 15,000 lbs. of V_2O_5 per month and offering to sign a contract for a fixed amount. Both VCA and Electromet Sales almost simultaneously refused to supply the oxide. (Pl. Exs. 206, 207, R. 1951-1953.) Burwell testified that he had heard "in a dozen conferences" that the reason Electromet Sales would not sell oxide to Continental Ore was "because they wanted to keep him out of the vanadium business. *No other reason.*" (Emphasis added.) (R. 2781-2782.)[9]

[9](Burwell R. 2782): "Q. Did any of these corporations, now that you were connected with, make an order, a formal order on policy to that effect, that you know of? A. No smart lawyer would let a corporation make a formal order in writing of that kind of thing. Our instructions were never to write anything down like that." Burwell testified that Bransome personally told him that VCA was trying to keep Mr. Leir out of the vanadium business. (R. 663.)

This company filed an antitrust action in the United States District Court for the Northern District of California, Southern Division.

A judgment entered upon a jury verdict in favor of respondents was affirmed by the Ninth Circuit, *Continental Ore Co. v. Union Carbide and Carbon Corp.* (9th Circuit 1961) 289 F. 2d 86. This honorable Court granted certiorari on October 23, 1961 (No. 304) and it is now before this Court.

North Continent Mines: This was an operation of approximately 40 tons a year. (Pl. Ex. 30, R. 674.) The mill was turned into an ore selling operation by USV. (Pl. Ex. 3; R. 576; UC 141; R. 2369; 852-853; 2430-2431.) It was subsequently sold to Union Mines. Van Fleet was the president of this company and Burwell the vice-president. Union Carbide's plans to control post war conditions included acquiring this property. (Pl. Ex. 230, R. 2414-2416.) Union Mines became the vehicle to accomplish the feat.

Mr. Burwell dramatically explained the reasons for this exclusionary policy (R. 676):

> "At that time we knew we had a billion-dollar field. We were playing the cards for a billion-dollar field. And the way you get a billion-dollar natural resource is to acquire it this way. So all may be the tooth and the fang, but this is the way mining engineers proceed —business people proceed to acquire, control a natural resource, and this policy was directed to me by Mr. Van Fleet, and it was also directed to me previously by other corporation officials previous to 1938. This was a policy that continued from 1926 and had never been stopped."

As already indicated, respondents became particularly concerned about competitors at this time because the European rearmament program which preceded the war in 1939 was generating a new demand for ferrovanadium in Europe and shooting up the export price. (R. 1937-1945.) This demand gave independent mills and operators a market which would have permitted them to establish the nucleus of an independent operation and threatened the monopoly held by respondents. On March 28, 1940, Bransome wrote to a French company that the high export prices were making for people trying to buy domestic and sell export. (Pl. Ex. 205, R. 1947.) Bransome wrote that they had "this phase under very good control, and if any shipments do get away" "they are very small ones." (Pl. Ex. 205.)

And pursuant to their conspiracy, respondents divided the foreign orders that did not "get away". For example, in 1939, when a $640,000 shipment was made to France, Bransome phoned Sneath, the European representative of Union Carbide, and had the order split, one-half to Electromet and one-half to VCA, the price of ferrovanadium being *the same* for both companies. (R. 1937-1940; Pl. Ex. 203, R. 1941-1944.)

In addition, domestic customers were allocated between respondents. For example, in 1940, Burwell, while attempting to sell available uranium concentrates to the Vitro Corporation in Pittsburgh, learned that Vitro could use 100,000 lbs. of red cake. He convinced them that the red cake was better suited for their purposes than the hard fused black oxide they were using. (R. 710-712.) At this time USV had a tremendous surplus of oxide which

threatened to close its mines in the West. (R. 710.) When Burwell enthusiastically reported this prospective sale to Electromet's sales manager he was told that Vitro was a VCA customer and "VCA is selling their vanadium." (R. 711.)

And again in 1946, Burwell was told by the Sales Manager of Electromet Sales *not to mention* vanadium to the President of the Crucible Steel Co., a large steel company, because Crucible was a VCA customer and Electromet Sales personnel had been instructed by their superiors not to approach VCA customers. (Burwell, R. 713.) These instructions were substantiated by Raymond C. Sullivan, who was present at the meeting where these instructions were given Burwell. (Sullivan, R. 2788-2789.)

(c) Fixing the Prices of Ore

As part and parcel of this conspiracy to monopolize the vanadium industry, respondents conspired to fix the prices paid for the raw ore. VCA chose not to open its Naturita plant until 1940 and to allow Union Carbide to produce the domestic oxide and then to purchase the oxide from USV. (Burwell, R. 642.) This left USV free to pay whatever price it desired for the Plateau ore. Instead of competing with USV for the ore, VCA chose to allow USV to purchase the ore at a price fixed by USV and then purchase the oxide from USV at a price fixed between themselves.

In 1940, because of the increasing war demand, it was decided that VCA would open its Naturita plant, which it had allowed to remain dormant while it purchased oxide from its competitor USV.

Prior to the opening of this plant Burwell of USV, Van Fleet of USV and Bransome of VCA met at Mr. Bransome's private club in New York "in or about 1939" or "just prior to the starting of the Vanadium Corporation's plant . . . 1939 or 1940". (R. 641-642.) At that meeting it was agreed that both companies would pay 21¢ a pound for ore, using 2% vanadium as the basing point. (R. 643.)[10] Mr. Bransome admitted discussing ore prices with Burwell. (R. 1903.)[11]

Thereafter, until 1942, *both* USV and VCA paid a base price of 21¢ per pound for 2% ore. (Pl. Exs. 25, 47; R. 589-591; 1007.)

In the spring of 1942, Burwell, Bransome and Kett, General Manager of VCA's mining operations, and possibly Hill met at Dove Creek, Colorado. (Burwell, R. 644-646.) At this meeting VCA and USV agreed to increase the base price of vanadium ore to 31¢. (Burwell, R. 646.) After this meeting both companies commenced paying 31¢ for their ore. (R. 646.) The 31¢ base price remained the base price paid by both respondents from 1942 to the date of the filing of petitioners' complaint in 1958. (UC 157; R. 2500; Pl. Ex. 213; R. 1969.) The prices remained the same "even though the operating costs [were] going up". (Viles, R. 2017.)

Other USV employees verified that there was an agreement on prices. They included J. E. Weston, USV Super-

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[10] (Burwell R. 643): "Mr. Bransome wanted to know what the price was. We told him and Mr. Bransome, to my recollection, said 'All right. We will work with you and we will follow the general ore pricing schedule that you have.'"

[11] (Bransome R. 1903): "Q. Did you ever discuss ore prices with Mr. Burwell at any time? A. I think that probably once or twice." Mr. Bransome subsequently admitted talking to Burwell and Van Fleet late in 1939 or 1940. (R. 1920-1921.)

intendent of Operations on the Colorado Plateau and later USV General Mine Superintendent (R. 2790-2791) and Luther Franklin Watt, field assistant to Weston. (R. 1045-1047.)[12]

Others testifying as to price fixing admissions by respondents included Dennies Nielson, a miner (R. 1013-1017), Howard Balsley, an ore producer (R. 992, 993),[13] and Thomas Skidmore, another ore producer (R. 1053-1054).

At this same time the base price for MRC ore was also fixed at 31¢ and Mr. Hill, in a prior trial, testified that he was told by Mr. Burwell that the "base price" for MRC ore was to be 31¢ *(Hill R. 1415) and that Mr. Burwell* had fixed that price for MRC (Hill R. 1414).[14]

Burwell called a meeting at his home, attended by Burwell (USV), Kett (VCA), Viles (VCA) and Hill (USV

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[12]Mr. Watt testified that he was present on several occasions when Dennis Viles (VCA) and Weston (USV) met on the Plateau to discuss prices paid for ore and that on one occasion he, a USV field man, was reprimanded by Viles, a VCA employee, for "paying more for ore". (Watt R. 1047.) "... as far as sticking my neck out and trying to take it away from them (VCA) by offering more money, no." (Watt R. 1048.)

[13](R. 992-993.) Mr. Balsley testified that he met with Robert E. Sterling, Western Superintendent of Vanadium Corporation operations, and R. D. Renner, General Superintendent at Naturita, and they told him "they had to be leaving soon because he and Slim—meaning Mr. Renner—were going down to Uravan to meet with Burwell and Weston to see if they couldn't get together on this ore price and quit cutting each other's throat." This meeting took place on August 4, 1940. (R. 992.) The next day he saw Mr. Sterling and asked him how "he made out last night down at Uravan". Mr. Sterling replied "We got everything fixed up." (R. 993.)

[14](Hill R. 1415): "Q. In any event, it was Mr. Burwell who told you what price to pay. A. That is correct. Q. And specifically a 31¢ price? A. That is correct."

MRC), Sproul (MRC) and Edwards (MRC) to discuss ore prices. (Viles R. 2018.)

Not only did USV and VCA get together and fix the prices, but they diligently policed the field to make certain that prices were maintained. Direct evidence of this type of policing was presented. For example, on November 2, 1941, S. Power Warren, USV General Superintendent at Uravan, reported to his superior, King Haldane, in New York City, that they had caught VCA attempting to raise the ore prices, but that Blair Burwell had spoken to Ralph Blitz, VCA General Superintendent at Naturita, about it and "his discussion with Blitz remedied the matter." (Pl. Ex. 28; Burwell R. 648-649.)

On December 24, 1941, Haldane in New York wrote to Weston and Burwell in Colorado that Mr. Kett of VCA was protesting in New York to USV that USV was trying to take away one of VCA's miner-customers named Lyen by offering his $2.00 per ton "above the established rate". (Pl. Ex. 31; R. 685.) Haldane had advised Kett that he would look into the matter. (Pl. Ex. 31.) On December 27, 1941, Weston replied to Haldane that Lyen was only a "trouble maker" and that USV had checked into the story only to find that they had furnished Lyen with the regular list price and had "definitely" not offered him more than the established rate. (Pl. Ex. 49; R. 1042.)

And on June 16, 1942, Kett (VCA) wrote to Blitz (VCA) at Naturita that he had been informed that USV was paying a premium for its ore and suggested to Blitz that he should check fast by securing "original settlement sheets", "certified copies" of them or "a sworn statement (affidavit)" from a supplier. (Pl. Ex. 217; R. 2038.)

Throughout this entire period, in spite of this control of raw material, the domestic oxide, by USV, it was VCA that sold two-thirds of the ferrovanadium, the finished product.

(d) Direct Contracts Between Respondents

As further evidence of the conspiracy, in June, 1939, a collusive agreement called the "Maggie C" agreement was entered into between respondents which provided that USV would mine ore from VCA mining claims, convert the ore to vanadium oxide for VCA at USV's Uravan plant at 65¢ a lb. and then deliver the oxide to VCA. (Pl. Ex. 32, R. 696; Pl. Ex. 33, R. 699.) This price was 45¢ below the market price of oxide. At this time VCA could have obtained all the ore it desired from its Peruvian mine at 50¢ a lb. (R. 1894.) Under the "Maggie C" agreement, oxide was delivered to VCA until 1940, and during this time VCA executives had access to USV's records of production, tons removed, grades, costs, etc. (Burwell R. 698-699; Pl. Ex. 8; R. 582.) After all available ore had been mined out of the "Maggie C" claims, VCA was allowed to continue to draw on USV oxide in excess of the amounts of ore being produced from the "Maggie C". (Burwell R. 701.) VCA overdrew its account by 300,000 lbs. of oxide. (R. 1895.)

On September 26, 1941 VCA and USV got together on still another agreement called the "Dry Valley" agreement. (Pl. Ex. 35; R. 709; Burwell R. 701.) This agreement permitted USV to enter the Dry Valley claims turned over to VCA and to mine the additional ore which VCA had overdrawn. (R. 701.) This arrangement continued until 1942. (Pl. Ex. 34; Burwell R. 700.)

The Dry Valley properties originally had been leased to USV by the owners. (R. 1898.) The properties were subsequently offered for sale on a bid basis. VCA was interested in acquiring the properties, as was USV. Van Fleet phoned Bransome and asked him whether VCA was going to bid on the properties. (R. 1898-1900.) Bransome told Van Fleet he was interested and actually revealed the terms *and price* of his bid! (Bransome R. 1900.) Van Fleet thereupon underbid VCA and acquired the claims. When Bransome heard of this, he complained to Mr. O'Shea, president of Electromet and a vice-president of Union Carbide, and asked him to turn these claims over to VCA. (Bransome R. 1899-1901.) Mr. O'Shea ordered Burwell and Van Fleet to return the claims to VCA. (R. 1901.) Almost immediately Bransome entered the Dry Valley agreement with USV to repay the overdraft. (R. 1901-1902.)

During this period, VCA had available to it all the ore it desired in Peru (R. 1902), yet, during the period 1933-1939, USV sold to its only competitor, VCA, 20% of the latter's oxide requirements. (VCA 13; R. 1852-1853.) And almost unbelievably, although, during this period, VCA was purchasing 20% of its raw materials (oxide) from USV, VCA sold ⅔ of the market as to the finished product (ferrovanadium).

In 1939, Van Fleet and Burwell again requested the Union Carbide group to lower the price of vanadium to one in "reasonable relationship to our costs" and thereby increase its demands. (R. 609.) In spite of high inventories which threatened to close down USV's mining oper-

ations on the Plateau (R. 608); the price was not lowered. Instead, Sneath, the European representative of Union Carbide, arranged for the sale of one million pounds of oxide in Europe through a European cartel headed by Sir Edwin Davies. (Burwell, R. 609-611.) The oxide was sold in Germany and not in this country at a reduced price because "there was an agreement between Vanadium Corporation of America and the United States Electro Metallurgical Company" restricting the sales in this country. (Burwell, R. 611.)

(e) MRC Agency

Commencing with the year 1939 and during the war years, the Government issued certain orders concerning strategic materials, allocations, inventory accumulations and export controls. See Stipulation of Facts, R. 2722-2723.[15]

On May 9, 1942, USV was appointed agent for MRC to purchase vanadium bearing ores for MRC mills at Durango and Monticello and, later, the Nisley and Wilson mill at Gateway, Colorado. USV was authorized to pay

[15]These orders and regulations of course did not purport to affect the applicability of Sections 1 and 2 of the Sherman Act. (See *United States v. Assn. of American Railroads*, 4 F.R.D. 510.) The Small Business Mobilization Act affecting antitrust exemption was in effect during World War II. (Act June 11, 1942, C. 404, §12, 56 Stat. 351.) In substance the antitrust exemption provisions of the act required (1) the chairman of the War Production Board to consult with the Attorney General regarding any act or omission requested or approved by the chairman; (2) that the Attorney General issue a certificate to the effect that the plan is in the public interest and that no prosecution under the antitrust laws be commenced with reference thereto; (3) that the Attorney General report such proceeding to Congress and (4) that the certificates of exemption allowed by the Attorney General be published in the Federal Register.

miners up to 50 cents a lb. for 2% vanadium ore. (UC 4, 5; R. 772-775.) The Monticello mill was operated by VCA (UC 5; Pl. Ex. 14; R. 585) and the Durango Mill by USV (UC 4).

This agency contract of May 9, 1942 between MRC and USV contains no language giving or even remotely suggesting that USV was to have an exemption from anti-trust liability. (UC 4; R. 772.) To the contrary, the contract *expressly* states that USV is to comply with *ALL* applicable laws, rules, regulations and orders. (UC 4, Para. 7.) And the contract expressly holds USV *liable* for all negligent and intentional misconduct incurred in the performance of the agency contract even if within the authority granted. (UC 4, Para. 5.)

The individual Ore purchase agreements entered into between USV as agent for MRC, and the miners, including petitioners herein, carried a provision or a rider to the ore purchase agreement that provided that USV, as agent, shall "comply with and give all stipulations and representations required by applicable federal laws. . . ." (UC 96, 98-107; R. 1534-1543.)

Employees of USV were not considered employees of MRC for any purpose thereunder. (UC 4, Para. 2.)

Van Fleet was Vice President, then President of USV, as agent of MRC. Burwell was Assistant to the Vice President of USV, as agent of MRC. Hill was Supervising Engineer for USV, as agent for MRC. (R. 1292-1295; Pl. Exs. 151, R. 1395; 155, R. 1398; 156, R. 1399.)

All these individuals still were or had been executive officers of USV. In fact, these USV officers of the private

corporation USV were the only MRC personnel who had any intimate knowledge of the vanadium-uranium industry. Mr. Whitaker, the MRC consultant, not only had no knowledge of vanadium, but actually testified at the trial he had little knowledge of what the MRC ore buying program was all about. (R. 2602-2604.) Mr. M. Gustafson had no prior experience in the vanadium industry. On cross-examination he testified that he and the members of the AEC Committee on Raw Materials had to rely entirely on the officers of Union Carbide's units and VCA for information on the vanadium-uranium situation. (R. 1820-1822.)

At the trial petitioners introduced substantial evidence that USV as agent for MRC utilized its governmental agency specifically to limit ore prices, to further the existing conspiracy to monopolize between Union Carbide and VCA and to exclude any competition to USV and VCA. The Court below sustained the jury verdict awarding damages for unlawful conduct stemming from the use of MRC agency powers.

The Burwell-Bransome ore price agreement of 1942 which set the base price of ore at 31¢ per pound for 2% ore specifically involved respondents in an agreement involving the MRC ore buying program. (Burwell, R. 645-646; Pl. Exs. 25, 47, R. 590-591, 1007; Hill, R. 1413-1415; Edwards, R. 1548; Kett, R. 2075.)

Burwell fixed the 31¢ price as the MRC base price. (Edwards, R. 1548.)[16]

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[16] "There was a 31 cent base in the Metals Reserve." (Edwards R. 1548.)

Mr. Hill also testified that Burwell fixed and set the MRC base price at 31¢, the same price being paid by USV privately and by VCA. (Hill, R. 1415; R. 2388-2393; Kett, R. 2075.)

When Bransome and Burwell fixed the price of ore in 1942, it was obvious to them that high MRC prices would result in pushing their private purchase prices upward. Bransome readily conceded his concern over MRC prices affecting his ore prices. (Bransome, R. 1929-1931.)

Although 31¢ was fixed as the base rate, petitioners herein received only 12¢ a pound for 1.5% ore from USV as agent for MRC. (Pl. Ex. 117; R. 1306.) Shortly after, VCA obtained 48¢ per pound from USV as agent for MRC for 1.5% ore. (Pl. Ex. 155; R. 1398.)

While the base price for other producers was held at 31¢, in March, 1943, USV, as agent for MRC, entered into this ore purchase agreement with VCA allowing payment of 48¢ a pound *plus hauling allowances* to VCA for 1.5% ore located in Area No. 1; 39¢ a pound plus hauling allowance for ore located in Area No. 2 (Navajo Indian properties); and 48¢ a pound for roscoelite ore. (Pl. Exs. 155, 156; R. 1398-1399.) These prices were the highest prices paid any producer of ore. VCA received a total gross payment of $1,333,725 from MRC funds for its ore. (VCA 29; R. 2625.) And in 1943, respondents paid MRC $1.00 a pound for vanadium oxide (Pl. Ex. 23; R. 588) the price paid being 10¢ below the market price of $1.10. (Pl. Ex. 12; R. 584.)

VCA received the highest price paid for ore on the Plateau by MRC. The true measure of discrimination be-

tween what the miners would have received and what they actually did receive from respondents is apparent from this MRC contract entered into between VCA and USV as agent for MRC. (Pl. Ex. 155; R. 1398.)

The contract, dated March 11, 1943, providing for the payment of 48 cents a pound plus hauling allowance by USV as agent for MRC to VCA for 1.5% ore (Pl. Ex. 155) was signed by J. R. Van Fleet, Vice President of USV, agent for MRC, Buyer, and E. D. Bransome, President, VCA (R. 1398). The Ore Purchase Summary Sheets show that none of the plaintiff miners received 48 cents for 1.5% ore. (Pl. Exs. 170, 249; R. 1470; 2743.) Except for some very high grade ore shipped from Mr. Balsley's claims, no plaintiff in the consolidated trials ever received 48 cents for *any* grade of ore, and this differential could not be explained by cost of production, since the small miners' costs were not much different than VCA's. (Pl. Ex. 234; R. 2424; Letter Hill to Edwards, 9-9-43.)

This 48 cents deal in fact was made under instruction that Page Edwards, the MRC representative, was not to examine VCA's costs. (Pl. Exs. 185, 186; R. 1557-1563.)

Although Page Edwards claimed the 48 cents was arrived at after an examination of VCA's books, the evidence conclusively showed that any such examination would have had to have taken place in two days and Edwards would, in order to have determined VCA's cost, have had to investigate home office administration expenses in New York, since he allowed VCA 85 cents a ton for home office administration expenses. (R. 1558-1568.) There is no testimony in the record that he ever examined

VCA books which would permit him to determine what VCA's overall costs were.

It is uncontradicted in the record that, at the time of the inception of the MRC ore buying program, Burwell (USV), Kett (VCA), Sproul (VCA), Hill (USV), Edwards (MRC), held a meeting at Burwell's home at Burwell's request and discussed ore prices (Viles R. 2018-2024.)

The independent miners were kept uninformed that USV as agent for MRC had authority to pay as much as 50¢ per pound for ore. (Reed R. 910, Hill R. 1380-1382.) Many miners were not even offered MRC ore purchase agreements. Stanley Reed, a miner, testified that USV did not inform him of the MRC program and its purposes or offer him a better price with MRC funds even though at the time, USV was acquiring his claims because the low prices being paid him by USV individually did not permit him to operate his mines without going into debt to USV or even to make a living. (Reed R. 906-911.)

USV as agent for MRC was not authorized to divert ore away from independent mills producing vanadium oxide. (R. 1568; 1245-1246.) In fact, MRC was to encourage production. Yet Burwel USV officer of the MRC agency, actually diverted miners away from the Nisley-Wilson independent mill at Gateway, Colorado. (R. 1136-1138.)

Mr. Gardner, who was active in this operation, was summoned to his office by Burwell. When he reported to Burwell, Gardner was told that Burwell did not want him to operate the independent mill. (Gardner R. 1284.) When

Gardner stated he could not understand how a little 15 to 20 ton mill could interfere with such a large organization as USV, Burwell told him "I don't intend to let you operate." (Gardner R. 1285.) Gardner protested that with a war going on and the government in dire need of vanadium, the United States would not permit Burwell to close a mill. Burwell told Gardner, "I AM THE GOVERNMENT." (Gardner R. 1285.) Mr. Gardner testified that it took Burwell 18 months to do it, but he proved it! (Gardner R. 1285.)

When in October, 1942, Nisley protested these predatory tactics, Mr. Whitaker of MRC expressly instructed USV to supply ore to Nisley and Wilson immediately. (Pl. Exs. 111, 112; R. 1176-1178.) But ore was not delivered immediately and as a result of this delay Nisley and Wilson were not able to start full operation until April, 1943. (R. 1178.) The deliberate delaying tactic injured the young mill. When Nisley protested to Hill about the long delay in getting the mill into production, Hill told him:

> "Regardless of what the War Production Board said, or what the Metals Reserve Company said, my salary is paid by the United States Vanadium Corporation and they tell me how this is to be handled." (Nisley, R. 1176.)

While the miners were being diverted from the Nisley-Wilson scales by Burwell, his associate Hill was making arrangements with the Trustees of Gateway Alloys, the owners of the ore bodies surrounding Nisley's oxide mill, to shut off all supplies to Nisley and Wilson. (Pl. Exs. 237, 238; Cole R. 2531-2537.) Soon after this Trustee of

the Gateway properties, Ennis Cole, entered into a deal with John Hill, USV agent for MRC, to sell ore to MRC. Cole received a 4 cent a pound royalty for all ore sold to MRC; however, Cole did not put up one penny of investment to receive this financial sinecure. (Cole, R. 2537.)

Hill, the USV-MRC officer, terminated the Nisley-Wilson toll agreement on December 28, 1943. (Pl. Ex. 113; R. 1178.) However, VCA's MRC ore selling operation to MRC and the operation of the Monticello oxide mill by VCA was not terminated until February 29, 1944. (Pl. Ex. 14; R. 585.)

Nisley and Wilson thereafter went out of business. (R. 1194-1197.)

In addition to Nisley & Wilson, the North Continent Oxide Mill was turned into an ore selling operation by MRC in the middle of the oxide shortage (Pl. Ex. 3; R. 576, 853), as was the Blanding mill (Pl. Ex. 3; R. 576, 2430, 2431.)

The MRC vanadium program terminated in February, 1944. (Pl. Ex. 142 at p. 3; R. 1369.)

Thus, when the MRC agency was terminated in February, 1944 the Plateau was entirely controlled by the defendants. All independent millers of vanadium oxide were out of business. Defendants were in possession of the only mills at Rifle, Uravan, Durango, Naturita, and Monticello. Large and valuable ore bodies, such as the Wade and Curran properties, Skidmore's Lumsden Group (Pl. Ex. 184; R. 1490), Blake's Gyp and Valley View claims (Pl. Ex. 182; R. 1489), had been acquired by respondents, who at that time, alone knew of their uranium value. "We had 90% of the field." (Burwell R. 753.)

Petitioners owned valuable vanadium claims from which they were selling ore to MRC. Respondents coveted these claims, which could form the "nucleus of an independent operation".

Hill terminated petitioner's ore purchase agreement with MRC although they had a "duration of emergency clause". (R. 1366-1381.) Although petitioners requested MRC that they be allowed to pay off $3000 owed to USV by purchase of their ore (Pl. Ex. 145; R. 1377), this request was refused.

As will be shown in detail hereinafter, the indebtedness of $3000 was then used as the means of acquiring the Wade-Curran interest for respondents. (Pl. Ex. 138; R. 1361.)

Under this evidence, the jury could well conclude, as it did, that, as part of their pre-existing conspiracy, respondents used USV's MRC agency powers to control the prices paid for ore, to monopolize the field, to run independents out of business and to acquire valuable claims to insulate themselves from competition in the post war period or to prepare for the uranium bonanza which they knew was in the future. The Appellate Court below found this to be true in its opinion. The realistic appraisal of this evidence is that the economic factors unleashed by the war threatened the active monopolization which Carbide and VCA had achieved, and that Carbide thereupon used its agency powers to neutralize this threat. It is almost an economic axiom that wars and preparation for wars spawn new business organization. Carbide itself was formed in 1917. Yet at the end of the war Carbide and VCA had effectively eliminated any independent from

surviving. The jury found that Carbide used its agency powers from the government to further its basic plan of monopolization with VCA. And the Appellate Court below agreed. Under the stress of economic circumstances created by the war, the monopoly could hardly have been maintained unless the extraordinary power of government in Carbide's hands was enlisted in aid of its furtherance and perpetuation.

(f) Uranium

Uranium and vanadium are intertwined in carnotite rock. When respondents purchased carnotite ore, they necessarily received both the uranium and vanadium imbedded in the rock.

For a long while, uranium was sold only for its use in ceramic colors. Howard Balsley purchased *only* the *high grade uranium ores* for the Vitro Company, which used it as a pigment in ceramics. Otherwise miners were never paid for uranium content from 1937 to 1947—in spite of the following events:

In 1938, two German scientists by the names of Hahn and Strassman split the uranium atom. (Dana, R. 2224-2225; Burwell, R. 731-733.) In 1938, Sneath, Vice-President of Electromet, who headed Carbide's European operations, visited Uravan because he had heard of a "new element metal being produced in a small way, of uranium" and Van Fleet had told him that USV had a quantity of this new metal in sludge piles, which *"seemed a little fabulous"*. (Sneath, R. 2341.)

As early as 1938, the Union Carbide group of companies became aware of the new possibilities of the use of ura-

nium for atomic energy. (Burwell, R. 719-723.) Burwell testified (R. 727):

> "Again in 1939 and in 1938 and years prior to that we, or I, had definite knowledge of the value of uranium as its atoms structure for energy. . . ."

In 1938, there was the explanation by Lise Meitner of the experiments conducted by Hahn, Strassman and Meitner in Germany as to the release of energy by splitting of the atom. (Groves, R. 1587.) And in January, 1939, Enrico Fermi revealed this fact in the United States in his famous address in which he suggested the possibility of chain reaction by the splitting of the atom. (Dana, R. 2225.)

This information "fired the whole imagination" of Carbide officials. (Burwell, R. 732.) General Groves testified these revelations "probably got the scientific people greatly excited" and emphasized the potential value of uranium. (Groves, R. 1587.) Burwell discussed the matter of "future use of uranium" with officials of Union Carbide on many occasions in 1939. (Burwell, R. 720, 732.) He soon appeared before the "principal officers" of Union Carbide, and sought authorization and finances to construct a uranium recovery unit, which was eventually granted. (R. 720, 721.) At these meetings, he told his superiors that the construction of the unit "was related to a potential use of uranium in connection with the energy of the atom". (Burwell, R. 721.) As a result of this information, a uranium recovery unit was authorized and constructed at Uravan in 1939 for the specific purpose and objective of developing "a supply of uranium for an anticipated use of uranium as an energy source". (Bur-

well, R. 720.) Burwell was the USV officer assigned to this project and he "laid out the design and provided the metallurgical process control directions" and "supervised construction and operation of the plant". (Burwell, R. 720.) This plant processed approximately 100,000 tons of tailings for their uranium content. (Burwell, R. 719-723.) These tailings included the tailings from all ore sold to USV by independent miners from 1939 to 1942. (Burwell, R. 719-723.) For this ore the miners were paid *nothing* for uranium content, even though Burwell testified that he and Carbide knew that uranium had value as early as 1938. (Burwell, R. 727.)

Burwell testified (R. 720):

> "The project of recovering the uranium from the tailings was a process. The main purpose and objective was to develop a supply of uranium for an anticipated use of uranium as an energy source, which we knew of at that particular time, in 1939 or prior to that."

In the absence of the conspiracy to monopolize and to restrain it would have been impossible to pay the miners *a net zero* for the valuable uranium element. At this point the security question was not in the picture at all.

The war in Europe commenced in September, 1939. In November, 1939, Dr. Leo I. Dana, Vice-President of Technology of the Linde Air Products Company, another Carbide subsidiary, who was in charge of the company's research laboratories at Tonawanda, New York, made a special trip to Uravan to examine the tailings. (Dana, R. 2219.) As a result of this trip, it was agreed that samples of uranium would be sent to Tonawanda "to

carry out the rather broad investigation of the future potentials of the corporation to produce uranium, and the methods for refining to suit the possible markets which might be developed as a result of its atomic position". (Burwell, R. 724-725.) Burwell started construction of the recovery plant in 1939. On May 4, 1940, he wired Dr. Dana that he expected to have the "uranium product" in mid-May, 1940, that he would ship 1,000 lbs. of sludge at that time and that he would be in Tonawanda himself within a week. (Pl. Ex. 37; R. 726.)[17]

Neither General Groves nor any government agency prevented Carbide or VCA from paying for uranium content in the ore in 1940 or 1941. (Groves, R. 1592-1593.)

In 1940, of course, Burwell and Bransome met in New York and agreed to pay the miners a base price of 21¢ for 2% vanadium ore and nothing for the uranium content. (Burwell, R. 641-643.) This agreement was made on behalf of USV by Burwell, who, as early as 1938, was aware that uranium had a definite value for energy purposes; in fact, he was actually in the process of constructing a unit to recover it in 1939 at Uravan. (R. 719-720.) Obviously, by agreeing to pay for vanadium only, a necessary and implicit result of the price fixing agreement

[17]Although at the trial respondents claimed that this experimentation was for ceramic purposes only, the falsity of this claim was made obvious when it was shown that the May 4, 1940, telegram was marked, "Restricted" in two places (Pl. Ex. 37) and Dr. Dana, on cross-examination, testified that the telegram was not marked "Restricted" because of the ceramic industry, that there was nothing secret or restricted about the ceramic industry, and he could not explain why it was marked "Restricted" if only the ceramic industry was involved. (Dana R. 2231.) Mr. Burwell testified that the fact that the telegram was marked "Restricted" had nothing to do with the ceramic industry. (R. 725.)

was that the price of the valuable uranium was fixed at nothing.

By May, 1940, Union Carbide had actually commenced recovering uranium oxide at Uravan. (Burwell, R. 719-724; Pl. Ex. 37.)[18]

As further evidence of the knowledge of Carbide of the value of uranium, in 1941 a book by Jack DeMent and H. C. ...hl entitled "Uranium and Atomic Power" was published revealing the value of uranium. (Pl. Ex. 261; R. 2775.) Both Burwell and Dr. Dana, Carbide's top research man in this field, acknowledged that they read the book. (Dana, R. 2332-2333; Burwell, R. 728.) Still nothing was paid the miners for the uranium content in their ore.

In 1938, Van Fleet had met with Burwell and Sneath at Uravan and discussed the "new element", uranium, which "seemed a little fabulous". (Sneath, R. 2341.) Soon after, Van Fleet wrote Burwell asking him to secure definite information on Colorado oxide production. (Pl. Ex. 29; R. 664.) After Burwell's report, Van Fleet reported to his superiors that "we have purchased two or three groups of claims which are potential producers and could be the nucleus of an operation". (Pl. Ex. 30; R. 674.) He soon instructed Burwell to "acquire all the property in the Colorado Plateau that would possibly produce vanadium in competition with the United States Vanadium Corpo-

[18]During this period there were no government controls or involvement. General Groves testified that the first contact between the government and Union Carbide was in 1942 when a predecessor organization of the Manhattan project purchased some graphite from the National Carbon Company, another Carbide subsidiary. (Groves R. 1592.) The Manhattan District was not even formed until fall, 1942. (R. 1711.)

ration". (Burwell, R. 675.) Burwell then launched his program of eliminating any independent who could start any competitive business, as he was "playing the cards for a billion dollar field". (Burwell, R. 676.)

(g) The Manhattan District and Union Mines Development Corporation

The Manhattan District was organized in the fall of 1942, as a special emergency district by the War Department to attempt the development of an atomic weapon for use in the war. (R. 1711.) It is clear that from this date in 1942 respondents adopted the policy of paying nothing for the uranium content of the ore, long before any contact with any security regulation.

In November, 1942, Linde Air Products entered a contract with the Manhattan District authorizing Linde to expand its Tonawanda laboratory solely to continue its production of uranium oxide. (Dana, R. 2346-2346A.) The Government subsidized the expansion of this plant by the payment to Linde of $1,449,000. (Pl. Ex. 228; R. 2237; R. 2346-2346A.)

On May 11, 1943 Union Mines Development Corporation, a wholly owned subsidiary of Union Carbide, entered into a letter agreement with the United States Corps of Engineers. (UC Ex. 17; R. 797.) The letter agreement authorized Union Mines to work on the development of uranium resources and beneficiation of uranium. The letter, however, specifically provided:

> ". . . All applicable contract clauses required by Federal Law and Executive Order to be incorporated in contracts for the services of the kind herein specified, are hereby incorporated herein by reference."

The Corps of Engineers specifically provided that Union Mines was to act in good faith in all its activities. Union Mines was held harmless except where:

> ". . . such loss, expense, damage or liability is due to the personal failure on the part of your [Union Mines] corporate officers, or other of your representatives having supervision or direction of the work as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of your business."

On April 17, 1944, an exploration and development contract was executed between Union Mines and the Corps of Engineers effective retroactively to May 1, 1943. (UC Ex. 17, R. 800.) The contract allowed Union Mines to purchase properties believed to contain uranium deposits in the name of Union Mines for the United States. (Id.)

USV's Van Fleet was president of Union Mines and Burwell was vice-president of Union Mines. (Id. and R. 731-733.)

12½% of the total uranium processed by the Manhattan Project was of domestic origin, the remaining 87½% of foreign origin, principally from the mines in the Belgian Congo, Katanga Province, all of which were flooded and under water during the period that the project was desperately seeking uranium. (Merritt R. 1712, 1728-1730.)[19] During the Manhattan District period, both USV and VCA sold tailings and uranium bearing sludge to the

[19]Dr. Merritt testified that the ore obtained was not from the mines, but from tailings that had been stockpiled before their flooding. (Merritt R. 1728-1730.)

Manhattan District.[20] (Pl. Ex. 159, R. 1453.) These tailings and concentrates included the savings from the carnotite ore sold by the independent miners to respondents and for which no payment for uranium content was ever paid, was being paid or has since been accounted for. In November, 1943, Hill (USV) and Viles (VCA) discussed uranium payment. (Pl. Ex. 232, R. 2421.)

Although vanadium was in demand during the war, by November, 1943, the demand had been satiated, the shortage was at an end. (Pl. Ex. 221, R. 2153; Pl. Ex. 264, R. 2777.) At that time, Carbide and VCA officials were aware that the prize was uranium and had already commenced making plans to insulate their post war future and to prevent any competition. Burwell testified (R. 616):

> "Then there was still another great thing developed. Of course, by this time we knew, as engineers, and all of us knew, and I think even the VCA knew, because they had some smart men in the field, too, that this field was a rich prize, one of the greatest mineral resources of all times for new things in energy and new things in steel. Therefore, the control of the future lay in who had the first market place and the first plants to take it on, and a trickle at that time would become a river of money later on."[21]

In October, 1943, Burwell made a complete report to Van Fleet, Rafferty and Halliday at Carbide headquarters

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[20] Union Carbide sold $1,593,165 of uranium values, 1943-1947 (Pl. Ex. 161; R. 1455); VCA sold $670,088. (Pl. Ex. 162; R. 1461.) See also Pl. Ex. 159 showing unit prices of uranium material sold to Manhattan District.

[21] Respondents made a **net** profit from sales of uranium products in the ten year period, January, 1948 to December, 1957 of $24,747,257. (Pl. Ex. 168; R. 1468.) This was the trickle that became the river.

in New York that "a situation was developing in which uranium promises to become the valuable element and vanadium a by-product". (Pl. Ex. 230, R. 2414.) He recommended the acquisition of *key properties* on the Colorado Plateau to protect the corporation for its future uranium and vanadium business. (Pl. 230.) Of course, petitioners held one of the "key properties" on the Colorado Plateau. Burwell was careful to recommend that any evaluating of the ores be performed by USV and not by Union Mines. (Pl. Ex. 230, p. 4.)

(h) Cementing the Monopoly for Post-War Developments

This insulation for the future demanded the predatory practices against the independents which the jury and the Court below found to have occurred. Thus in December, 1943, Mr. Nisley of the independent Nisley & Wilson Mill, after being allowed to visit the Uravan plant by the Army, succeeded in working out a process to extract uranium. (R. 1181-1183.) He reported it to the Army, and "ended up in an office with Mr. Burwell". (Nisley R. 1182.) Mr. Burwell told him "I won't permit you to get into the uranium business". (Nisley R. 1183.) He never did get into the uranium business.

On January 1, 1944, the Nisley & Wilson Mill stopped production (Nisley R. 1180) and with the demise of this mill, all independent mills on the Colorado Plateau were out of business. (Pl. Ex. 3.)

Independents contemplated acquiring the Durango Mill. That mill was built for $100,000 for MRC, but USV was given an option to buy the mill at a depreciated price. (R. 1354.) Burwell supervised the building of the plant and ran it. (Burwell R. 694-695.)

Haldane informed Mr. Rafferty, one of the chief Carbide executives, that USV considered it highly essential that USV acquire this Durango plant for several reasons, included among which were (Pl. Ex. 137, R. 1358 at 1360):

> "To maintain its position in the vanadium industry of the southwest. Repeated reports have reached this Company of plans of outsiders to acquire the plant in the event United States Vanadium Corporation decides not to exercise its option. *The injection of additional operators in this field would undoubtedly seriously disturb conditions in the vanadium industry in the post-war period* . . .
>
> "You are aware of the discussions now going on between United States Vanadium Corporation and Army officials covering the application of an alkaline leach to crude carnotite ores. Tests to date indicate a 90% extraction of the U content and approximately 20% of the V. Arrangements are now being studied for the installation of a 50-ton unit embodying such a flow sheet . . .
>
> Durango would, furthermore, be the logical place to treat the Uranium ores of the Navajo Indian reservation, as well as those from the McIntyre Canyon section." (Emphasis added.)

The uranium ores referred to in this communication included petitioners' ore claims. (R. 1361.)

USV exercised its option and purchased this plant for $75,000 (R. 694-695), despite the fact that at this time there was a surplus of oxide and USV's plant at Urayan was either closed or in the process of closing. (R. 1355.)

In 1945 VCA acquired the Monticello Mill under lease from DPC. (Pl. Ex. 14, R. 585.) Mr. Viles had previ-

ously stated that the acquisition of Dry Valley properties would be "a good investment if only to prevent some outsider getting ideas in regard to the Monticello plant." (Pl. Ex. 36, R. 709.)

VCA had never intended to pay the miners for uranium. (Trudeau R. 1104-1105.)

It was during this period that respondents made the arrangement to acquire rich claims in the area (Pl. Ex. 320, R. 414) including Petitioners' properties by Union Mines Development Corporation (Pl. Ex. 151, R. 1395), which ores it would be "logical" to treat at Durango. (Pl. Ex. 137, R. 1358.) As to VCA see Pl. Ex. 216, R. 2033.

By these acquisitions and the exclusion of all other mills, respondents had a 100% control of all oxide plants.

On July 16, 1945, the test bomb was exploded at Alamogordo, New Mexico (R. 1585-1586) and in August, 1945, the first atomic bomb was dropped. By that time there was no question that uranium had economic value. (R. 1586-1587.) Yet respondents who were selling uranium to the government for profit, still refused to pay the miners for average uranium content after the bomb was dropped. The first price schedule for payment for average content of uranium in the Colorado Plateau was published by VCA in April, 1947. (Pl. Ex. 213, R. 1969.) Counsel for VCA stipulated that prior to April 1947, VCA did not pay miners for average uranium content. (R. 931-932.)

In February, 1946, Van Fleet requested Burwell to prepare a study to permit the lowering of the fixed ferrovanadium price. (Burwell R. 686.) Van Fleet informed Burwell that Electromet had decided to lower the price

of ferrovanadium and that the reason for the change in policy was that VCA was selling a ferrochrome silicon[22] at a low price and that Electromet considered this "a breach of understanding between the two companies". (Burwell R. 686.) However, the prices of ferrovanadium were not lowered after Burwell prepared his study. Mr. Burwell testified that he subsequently discovered that the reason for not lowering the price was that Carbide wanted to maintain the price of ferrovanadium and did not want to gear the production of vanadium to uranium. (R. 686-690.)[23]

Burwell desired to gear the production of vanadium to uranium because the "future of uranium was so important that uranium had to be obtained ahead of vanadium and without any regard as to whether you would sell vanadium or not". (Burwell, R. 688-689.) He requested that expenditures be made for the development of uranium as prime material and vanadium as the by-product. Priestley refused to permit a decrease in the price of ferrovanadium and opposed Burwell's proposal to concentrate on uranium because it would provide surplus vanadium. Mr.

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[22]Ferrochrome silicon is an alloy material that can be used with chrome or as a substitute for low carbon ferrochrome.

[23]Burwell testified that he attended a meeting at Carbide headquarters attended by the top officers of the Group. Haggerson, president of Carbide; Priestley, president of the Metal-Chemical division of Carbide; Rush, Counsel; Davidson, vice-president; McClure, vice-president of a Carbide division; and three or four other vice-presidents of the corporation who constituted the active management of Union Carbide. Mr. Rush is presently head of the Nuclear Division of Union Carbide. He is a member of the Board of Directors, Supervisor of Oak Ridge. (R. 2223.) He was one of the leading figures in many of the transactions testified to at the trial. He was invited to be present to testify throughout the trial. (R. 2223.) Mr. Rush was never produced.

Burwell left this meeting stating that if Carbide did not have a "deal with VCA they could sell the vanadium". (Burwell, R. 686-690.)

Further evidence of the agreement between VCA and Carbide was the bid-rigging incident of October, 1946. Priestley suggested that USV refuse to accept a bid it had won from the government and, instead, suggested that Carbide split the bid with VCA, which had lost the competitive bid. (Burwell, R. 690-694.) The reason given by Priestley was that VCA had just agreed to increase the price of ferrochrome silicon to a point where it would not be used as a substitute for low carbon ferrochrome and that, for this reason, he didn't want to antagonize VCA. (R. 693.)[24]

Just three months prior to this attempt at bid rigging to split the market with VCA, Burwell had been informed by Mr. DuTot, Electromet Sales, Sales Manager, not to attempt to sell vanadium to the Crucible Steel Co. because it was a VCA customer. (Burwell, R. 712-713.)

On December 31, 1946, the Manhattan District was terminated (R. 1724) and the Atomic Energy Commission took over its operation in January 1947. (R. 1725.)

The government policy was not to make any effort to develop the Colorado Plateau, but to treat uranium only as a by-product of vanadium. (R. 1811-1814; Pl. Ex. 196; R. 1736.) The principal sources of uranium during this period were from the Belgian Congo and a small mine in

[24] (Burwell R. 693): "Mr. Rafferty said, 'Mr. Priestley do I understand that you are still conniving on this business with the VCA? I thought we were all over that kind of monkey-business . . ."

Arctic Canada. (R. 1813.) There had been no vigorous program of developing new sources of uranium or the rich resources of the Colorado Plateau. (R. 1813.)

During this period the principal advisers of the people setting this policy were the officials of respondents. (R. 1820),[25] and respondents were interested in maintaining the importance of vanadium and its artificial price because of the agreement between themselves and the large investments they had made in vanadium.[26] In 1946, Burwell had attended a meeting of Union Carbide officials and recommended that uranium be developed as a prime material with vanadium as a by-product. (Burwell, R. 686-690.) Burwell recognized the richness of the Colorado Plateau and realized the danger of depending on Congolese uranium mines which were under water throughout this period and the period when the atomic bomb was being developed. (R. 1729.) However, Carbide officials objected to the proposal because they were concerned with

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[25]John Kyle Gustafson was associated with the Executive Vice-President of MRC. He went to the AEC in 1947. His vanadium experience to 1943 was one trip to the Colorado Plateau. (R. 1820.) He had no experience in the vanadium industry at all. (R. 1820.) His entire knowledge, for practical purposes, came from appellants. (R. 1820.) His entire uranium experience came from Union Mines, which was administered by USV and from Burwell and Van Fleet, Viles and Bransome. (R. 1821.)

[26]There are two ways to produce ferrovanadium. One is by using electric furnaces, which was the process used by appellants. The other is by an alumino-thermic process requiring no furnace. (Burwell R. 618.) Continental Ore sold a product called Van-Ex, which required no furnace but only the direct introduction of oxide and ores in a steel bath. (Priestley R. 2174.) Priestley testified that Carbide was deliberately discouraging this because Carbide had hundreds of thousands of dollars invested in plants and furnaces. (Priestley R. 2173-2174.) He actually reprimanded a salesman for selling the substitute. (Priestley Pl. Ex. 226, R. 2174-2175.)

the protection of their vanadium investment. (Burwell, R. 686-690.) Burwell left the meeting heatedly announcing that if Carbide ceased making "deals" with VCA, this problem would be solved. (Burwell, R. 686-690.)

In 1948, a comprehensive re-evaluation of the situation was made and the United States' uranium policy was changed. (R. 1813-1824.) The Atomic Energy Commission then decided to emphasize the procurement of domestic ores and thereby spur the development of the Colorado Plateau. The big spurt did not occur until late in 1951. (R. 1734; R. 1815, Pl. Ex. 196, R. 1737.) One of the reasons for reversing its policy was that "considerable protest" was beginning by Senators Johnson and Milliken of Colorado and independent miners over the fact that the independent miner was not being given a chance to develop the uranium reserves of the Colorado Plateau. (R. 1823.) One of the leaders in this protest was Burwell. (R. 1823.)

Van Fleet died in October, 1947. (R. 1672-1678.) After his death, Mr. Emigh of USV made a search of his home to recover certain documents, which had in the meanwhile been forwarded to Burwell. (R. 1672-1678.) Soon after, in December, 1947, Burwell resigned from USV. (Burwell R. 658.) After his resignation, Burwell was offered $50,000 as a price for his silence. (Pl. Ex. 193, R. 1689.) He rejected this.

After his resignation from the Carbide organization, Mr. Burwell was still concerned over the failure to develop the uranium resources of the Colorado Plateau and that the production of uranium was being limited by appellants by gearing its production to vanadium. (Burwell R. 658-663.) So Burwell prepared a proposal for the

building of a plant in the Colorado Plateau designed to recover uranium as the prime material and produce vanadium only as a by-product. (Burwell R. 659.) This plant was to be operated by the Molybdenum Corporation of America (Burwell R. 661-662) and was similar to the plan he had presented to Carbide in 1946, which plan had been rejected because Carbide was concerned with maintaining vanadium prices (supra). He presented this proposal to Mr. Bransome of VCA. The plan was rejected. (Burwell R. 683.) The reason for its rejection was that VCA desired to maintain its vanadium market and feared that the plan would permit independent operators to get into the vanadium business and compete with it. (R. 663.) Burwell testified at R. 663:

> "Mr. Bransome said 'Blair, supposing independent producers of ore, and there were a number at that time had developed—I suppose these independent producers of ore had vanadium and uranium ore and brought their ore up to this central plant that you propose. The vanadium then would be turned back to them to sell or to dispose of, isn't that correct?'
>
> I said, 'Yes, that's correct.' I said, 'We cannot in this particular emergency deny any person the right to get his vanadium back,' that this situation had now become bigger than either the Union Carbide or the Vanadium Corporation of America, in my estimation.
>
> Then he asked this: 'What would happen if somebody like Continental Ore or Mr. Leir shipped some ore to this central plant? Would he get the vanadium back?' I said, 'Surely, he would. So would anybody else who owned the ore. They would all have to have the same right.'

> Mr. Bransome said, he paced back and forth in his office, he said, 'That would put Mr. Leir into the vanadium business and that is what we are trying to keep him out of.' "

The plan was not carried out because of these objections. In fact, in 1947, Mr. Bransome informed the AEC that VCA would not process ore for uranium unless it was paid for the vanadium. (Merritt R. 1727-1728; VCA 10, 11; R. 1714.) The original contract proposed no payment for vanadium. (Merritt R. 1726-1728.) Bransome threatened to close the plant down unless he were paid for both vanadium and uranium. (Merritt R. 1725-1726.) The uranium was required so AEC agreed to pay 98.475 cents a pound for vanadium they did not want. (Merritt R. 1728.) And since the government was paying for the uranium, Bransome suggested to the AEC that the price for the uranium should include a payment to the miners for the ore (Merritt R. 1727), and it was Mr. Bransome who fixed that price at 50¢. (Merritt R. 1729; Bransome R. 1968.) Captain Merritt testified he took the price suggested by Bransome without any protest. (R. 1749.)

So it is that the position of Mr. Priestley and Mr. Bransome to continue to treat uranium as a by-product for fear of surplus in vanadium tailings was actually incorporated into the policies of the AEC. Plaintiffs' Exhibit 196, R. 1736, the Statement of John K. Gustafson, Manager, Raw Materials Operations, U. S. Atomic Energy Commission, December 17, 1948, stated:

> "Following the war it was tentatively decided by the Manhattan District to purchase only by-product uranium rather than to stimulate and support increased

production by special incentives. This position was based on the fact that the known uranium reserves of the Colorado Plateau were limited and expensive to mine and process and that the only advantage of an accelerated program would be to make this limited supply available sooner. Since the estimated annual production of the Colorado Plateau, even under an accelerated program, would be small in relation to total U.S. requirements and to supplies available from foreign sources, it appeared more economical to obtain the uranium as a by product from the vanadium operations which were geared to the vanadium market."

This report then adopts a moderate program to develop the uranium potential of the Plateau. It was not until about four years later that the uranium boom hit. (R. 1734-1735.) In the meantime Mr. Burwell opposed the limited AEC policies and protested to Senators Milliken and Johnson. (R. 1824; Pl. Ex. 38; R. 872.) By the time of trial the American production of uranium had outstripped the rest of the world combined. (Pl. Ex. 195; R. 1731-1735.)

It is clear that there was abundant evidence that the respondents retarded the development of the Colorado Plateau to protect their vanadium monopoly, and that they used their vanadium monopoly to get the inside track in the uranium industry.

Almost unbelievably, throughout the entire period 1948-1957 despite the rising ferrovanadium and vanadium oxide prices of appellants, the miners uniformly were paid 31 cents a pound as a base price by respondents for vana-

dium, the same price fixed after the meetings of 1942, and valuable claims such as petitioners' claim were purchased for a pittance. Throughout the period 1938-1958 appellants made net profits of $70,000,000. (Pl. Ex. 168; R. 1469.)

(4) EFFECT OF CONSPIRACY TO MONOPOLIZE ON PETITIONERS

(a) Introduction

The Wade and Curran transaction was part and parcel of the general conspiracy to monopolize the vanadium industry for which the jury found against respondents. The Court below sustained that determination. As applied to this case that conspiracy can be set down as follows:

1. Respondents conceived a total plan to monopolize the vanadium industry.

2. Direct evidence, based upon the confession of Burwell and the corroboration of the contemporary documents, proved that an essential part of the conspiracy to monopolize was the sedulous ferreting out and destruction of independent competition wherever it arose and in whatever form it arose. This included the destruction of independent mills or pre-emptive purchases of the production of organizations such as Anaconda Copper Company, for the specific purpose of keeping independent production "off the American market." (R. 675.)

3. Pursuant to the plan to destroy independent competition, the evidence showed that VCA and USV drove Wade and Curran out of business by a series of harmful acts.

As has been shown, petitioners were experienced operators and pioneers in the vanadium-uranium business.

(b) The Chronology of Acts of Injury and Harm

(i) The VCA Period

Mr. Charles Curran had originally assessed mining claims on the Colorado Plateau in 1916 to 1920. (Pl. Ex. 119; R. 1313.) In 1939, John F. Wade, Thomas F. V. Curran and H. R. Redington obtained two leases to mine carnotite ores on claims on the Navajo Indian Reservation. These leases were approved by the Department of the Interior in January and May, 1940, and covered five claims in the Carrizo Mountains: the Martin, Say-Tah, Eurida, No. 2, Sunnyside and Syracuse. (UC Ex. 84; R. 1431.)

They were interested in developing an oxide mill near the claims at Farmington, New Mexico and asked VCA for financing. (Pl. Ex. 118; R. 1309; 119; R. 1312.) Mr. Thomas Curran held a conference with Mr. Kett, in Pittsburgh, outlining the proposal. Mr. Kett, however, only offered to buy Curran's properties. (Id.) In 1941, VCA and Wade and Curran became competitive lessees on the Navajo lands. VCA acquired a lease on 960 acres of Navajo lands and sought to oust Wade and Curran from the area. (Pl. Ex. 121; R. 1318, 1322.) VCA's plan was to scheme with Redington, acquire the Redington interest in the partnership, unknown to Wade and Curran, and cause Wade and Curran to turn their interests over to VCA. The deal is set forth in Pl. Ex. 121, R. 1317, dated December 23, 1941, Mr. Kett, VCA's General Mining Superintendent to Garard:

> "Redington says that all of the money that has been spent on these claims has been spent by him. Neither Curran nor Wade have invested anything at all.

Therefore, Redington says that he proposes to sell these claims were and how he wants to sell them, and not through Curran and Wade. The idea now is for Redington to obtain an option from Curran and Wade on their interests, and then turn the whole thing over to us. I believe that if we can get these Redington Claims, together with what we may develop on our own leased land, we may have the nucleus of an operation in that area, the ore to go to Monticello. *Please don't say anything about this deal with Redington, since he is trying to get options from Curran and Wade before they get wise to the fact that he is dealing with us.*

I have gone into this matter with the Indian office in Washington, and there will be no trouble about the transfer of Redington's lease to us for cash, provided he can get rid of Curran and Wade."

Therefore, the plan called for Redington to deceive his partners by offering to buy from them without disclosing that the real purchaser was VCA. In other words, Redington and VCA conspired to defraud Wade and Curran as part of VCA's plan to "get rid" of them.

The fact that VCA and not USV, is dealing at this point, to acquire the Wade and Curran interests shows also the significance of the Dry Valley Agreement of September, 1941 as a division of territory agreement. (Pages 45 to 46, supra.)

However, to pick up the thread of the conspiracy within the conspiracy by which Redington was to deceive his partners for the profit of VCA, that attempt did not succeed. (Pl. Ex. 122; R. 1322.) The expectation, however, that the lands would somehow be taken away from

Wade and Curran remained. In this connection, a document from the files of VCA, written again to Kett in New York by VCA's Monticello Superintendent Garard reads as follows:

> "I am sure that Mr. Bransome will verify my statements in the past regarding the very likely possibility of those properties in question changing hands and eventually coming to the VCA, due to the fact that above mentioned parties are not living up to their contract—in fact, are in very poor standing with both the Government and the Indians.
>
> I am of the opinion that it isn't a matter of Redington sitting tight and holding these properties indefinitely, but very much inclined to believe that within the very near future, they will all be out of the picture." (Pl. Ex. 125; R. 1325.)

When VCA failed to obtain Wade and Curran's options, Redington, nevertheless, sold his interest to VCA, and VCA immediately wired Curran as follows under date of June 4, 1942:

> "Have purchased total Redington interest in Navajo Reservation carnotite mining lease of December fourth nineteen thirty nine and April fifth Nineteen forty and also loose ore stop. Will you please advise if you have made any arrangements to sell such loose ore and if so what they are furnishing us with copies of contracts if any stop. Hope you and Wade can arrange for early discussion with us of the future of this property." (Pl. Ex. 126; R. 1327.)

The Department of Indian Affairs refused to recognize the assignment of Redington's interest to VCA in September of 1942, following Curran's protest of the matter.

(Pl. Ex. 130; R. 1332.) Thus, only the intervention of the Department precluded VCA from neutralizing the Wade and Curran competition right at this point.

However, on or about the very day that VCA purchased the Redington interest, Thomas Curran wrote to Burwell of USV offering the ore from their claims for delivery to the Durango mill. In a document, which even the witness Hill said he could not explain (Pl. Ex. 123; R. 1321-1322), **BURWELL SENT CURRAN'S LETTER TO HIS SUPPOSED COMPETITOR, VCA.**

> "Grand Junction, Colorado
> June 5, 1942
> • • •
> Dear Mr. Kett,
> Attached is a copy of a letter Mr. Burwell received from Thomas F. V. Curran, 3507 Corona Street, Pittsburgh, Pennsylvania. He asked me to send this copy to you for your information."

VCA, attempting to oust Wade and Curran, was given a clear field by USV. When Wade and Curran turned to what it supposed was a competitive outlet, the competitive outlet surreptitiously turned over the information to VCA. In the light of the direct testimony in this case, indeed the confession of and the finding by the lower Court of the conspiracy to monopolize and to work together, the meaning of Plaintiffs' Exhibit 123 can have no other interpretation, and the verdict of the jury makes it mandatory that it be viewed in this light.

(ii) The USV Period

When VCA failed in its attempt to oust Wade and Curran by conniving with his Eastern partner, Redington,

USV moved into the picture. The fact that Burwell (USV) sent Curran's letter to Kett (VCA) showed again the continued maintenance by the parties of their Dry Valley agreement of September 1941, wherein Mr. O'Shea of the Carbide parent company recognized that VCA was to control the Utah-Arizona section of the Colorado Plateau. (See supra, page 46.)

Further collaboration between USV and VCA on Wade and Curran was shown at the meeting in 1942 between Burwell (USV), Kett (VCA, Sproul (MRC), Hill (USV-MRC), Edwards (MRC), and Viles (VCA). (R. 2017-2025.)

The treatment of Wade and Curran by USV-MRC became a decisive factor in the process of weakening Wade and Curran for final elimination.

During the period that Wade and Curran were shipping ore to Durango under the MRC contracts, they suffered grossly discriminatory prices. From May 27, 1942, to July 24, 1942, the USV-MRC contract provided for payment of 12¢ per lb. of 1.5% vanadium content. (Pl. Ex. 117, R. 1306.) This was the lowest price paid any producer or miner in this record. On July 24, 1942, the price was raised to less than 26¢ at 1.5% content. (Pl. Ex. 147, R. 1397.) On September 17, 1942, the price was set at 30¢ for 1.5% content. (Pl. Ex. 148, R. 1392.) As of May 21, 1943, a new contract was made which provided for 35¢ per lb. base at 1.5% content. (Pl. Ex. 149, R. 1392.) But VCA was guaranteed 39 cents per lb. for 1.5% ore in its contract of March 11, 1943, effective November 1, 1942, as to Navajo Indian properties and 48¢ per pound for 1.5% ore as to other areas. (Pl. Exs. 155, R. 1398; 156,

R. 1399.) Had Wade and Curran been paid on the basis of the VCA-MRC contract from the beginning, they could have operated successfully and retained their properties.

Wade and Curran, in debt over the MRC-USV contracts, invited Hill of MRC and an employee of USV to inspect the newly discovered Cove Mesa area in the Carrizo Mountains in confidence in the summer of 1943. Wade and Curran wished to obtain a loan for the development of the properties from MRC. They, of course, had to go to Mr. Hill who was employed by USV, agent for MRC. (Pl. Ex. 133, R. 1343.) Instead of exerting any effort to help Wade and Curran obtain a loan to finance the bidding for the Cove Mesa Leases, Hill cancelled the MRC contract with Wade and Curran on January 29, 1944. (Pl. Ex. 139, R. 1366.) Wade and Curran protested this cancellation. (Pl. Ex. 141, R. 1367.)

The MRC contract, however, contained a "duration" clause which provided:

> "The company reserves the right to cancel this contract without becoming liable for any damages to the Seller upon termination of the national emergency, as may be declared by the proper authority under the constitution and laws of the United States, or in the event the ores delivered by the Seller to it shall be found commercially unsuitable for treatment." (Pl. Ex. 149, page 5; R. 1392.)

But the cancellation was made with the specific knowledge that Wade and Curran were $3,000 in debt and had demanded that MRC honor the "duration" clause at least to allow them time to pay off the indebtedness. (Pl. Ex. 145, R. 1377.)

Petitioners urged in the Court below that implicit in the jury's verdict is the finding that the premature cancellation of Wade's MRC contract was pursuant to the plan to eliminate petitioners as part of respondents' overall conspiracy to monopolize on the following evidence: MRC directed USV to cancel the MRC ore contracts on December 11, 1943. (UC Ex. 85, R. 1433.) In cases where the right of cancellation was doubtful, USV was to send a copy of the contract with a proposed notice to MRC. This was December 11, 1943. As of January 31, 1944, the policy of MRC was to allow Wade and Curran to continue the MRC contract for the duration, pending the judgment of A. S. Hutchinson, Counsel for MRC. (Pl. Ex. 144, R. 1375.) As of February 24, 1944, Hill wrote to Mr. Hutchinson and told him that he would not accept delivery from Wade and Curran after February 28, 1944. (Pl. Ex. 145, R. 1377.) Thus, Mr. Hill has been caught in a difficult position. As of January 31, 1944, Mr. De Witt Smith of MRC stated that the cancellation of the Wade and Curran contract was a discretionary matter. (Pl. Ex. 144, R. 1376.) But at least two days prior to January 31, 1944, Mr. Hill had already cancelled the Wade and Curran contract. (Pl. Ex. 139, R. 1366.) Again, with respect to the request of Wade and Curran to work off the $3,000 by deliveries to MRC, Hill rejected the request on or prior to February 24, 1944. (Pl. Ex. 145, R. 1662.) But his final authority to do so, as claimed by respondents below in UC Ex. 87 (R. 1662) did not occur until March 10, 1944. Either Mr. John Hill was clairvoyant or he knew that Van Fleet and Burwell would arrange things as desired.

The learned Court below, however, found that the manner in which Wade and Curran's MRC contract was terminated was authorized by the Washington officials of MRC and therefore not within the scope of the conspiracy. There were, however, only two other operators outstanding who had a similar "duration of the emergency clause". Thus Mr. Hill wrote to Mr. A. S. Hutchinson, Counsel for Metals Reserve Company (Pl. Ex. 145, R. 1377-1378) in pertinent part:

> "Enclosed please find signed copy of an agreement of termination by mutual consent of the Claybaugh and Simpson Ore purchase agreement, dated December 12, 1942.
>
> With the receipt of this agreement, there are only three Ore Purchase Agreements remaining, of the type that *we do not consider we have specific rights of cancellation,* for which we do not have mutual consent termination agreements. You will recall that they are with G. J. Nielson, Utah Alloys Inc. and Wade, Curran and Company.
>
> Wade, Curran and Company is requesting our assistance in this payment of approximately $3,000 of unpaid accounts. These accounts are for mining machinery, supplies and expenses. They have requested that we allow them to deliver ore after February 28th in order to meet their obligations; however, they have been informed that no deliveries will be accepted after February 28th." (Emphasis added.)

But apart from the MRC, the other conspirator Mr. Bransome, President of VCA, interjected himself into the picture to make certain that Wade and Curran would feel that their chances of remedying the matter were

hopeless and futile. And rather than Page Edwards, the MRC agent, making certain that Wade and Curran understood that Bransome had no business intruding into the matter, Page Edwards did the opposite; he transmited a personal communication to Mr. Hill informing him of the meeting.

The memorandum from Edwards to Hill on February 4, 1944, reads as follows:

> "Wade and Curran were in today, not to see me, but to see Mr. Bransome and Denny [Viles]. They were quite put out regarding the whole matter and said they did not feel that their contract was subject to cancellation. Mr. Bransome is familiar with our general form and if their contract is on one of our O.P.A. forms Mr. Bransome felt that there was no question that the contract is automatically cancelled when we stop receiving ore. Evidently, their next move is to see Dan Melinskie in Cortez.
>
> All of this is merely to keep you posted as to your friends' activities." (Pl. Ex. 143; R. 1372-1373.)

The inability of Wade and Curran to get $3,000 at this juncture when USV's employees were the government agents through which this request was channeled is sharply to be contrasted with the fact that at the same time VCA secured from the government $3,145,355 to build a plant in the Peruvian Andes on the basis of a contract dated October 28, 1942. The plant actually was not completed until the war was over. It involved only vanadium and not uranium as was the case with the Wade claims, and VCA in 1946 purchased the plant built on their Peruvian properties for $500,000 within a year of its

completion at a cost of $3,145,355. (R. 1902, 2622-2624; 2711-2717.)

In another contrast, USV negotiated with VCA to give VCA the highest price for ore sales, resulting in payments of $1,300,000 from MRC for VCA's ore. (VCA Ex. 29; R. 2622.) Furthermore, MRC sold to USV and VCA vanadium oxide at $1.00 per pound although the market price was $1.10 per pound. (Pl. Ex. 23; R. 588.) This was an almost automatic 10¢ per pound profit plus a greater profit in connection with its manufacture into ferro-vanadium.

But the private plans of the respondents are shown to contemplate the ouster of Wade and Curran. The whole Wade episode is to be viewed in the light of the fact that in the fall of 1943 the private plans of Union Carbide contemplated the acquisition of properties, for their vanadium and uranium content, to protect the corporation. (See the revealing Pl. Ex. 230; R. 2414—Burwell to Van Fleet, October 1943; and also, as to VCA, Pl. Ex. 216; R. 2033.) The jury, under all of the evidence and in the light of the prior testimony of the admitted conspiracy to monopolize, could not help but view the activities of both VCA and USV against Wade and Curran as a simple carrying out of the primary objective of eliminating every outsider from the vanadium industry.

The evidence with regard to Wade and Curran then moves into the decisive phase whereby they lose their mining claims. When they were unable to get MRC help after devoting themselves to working for the MRC at Hill's price schedule, USV, as a private corporation, agreed to allow Wade and Curran $4,000, plus other

arrangements, in return for two-thirds of Cove Mesa (Pl. Ex. 153; R. 1396.) This was made not only after Hill had made a personal inspection of the properties in a confidential relationship with Wade and Curran, but after he had actually reported that the properties contained at least 15,000 tons of readily accessible ore. (Pl. Ex. 133; R. 1343.) At the time, of course, only Carbide knew of the uranium value of the properties. Wade and Curran did not. When Wade and Curran specifically asked Burwell why surveyors from Union Carbide's mines were on the property, Burwell falsely told them that the survey was being made for the Indian Office. (Pl. Exs. 134-135; R. 1343-1350.)

Thus by September 1943 USV held two-thirds and Wade and Curran one-third of the Carrizo Mountain property rights. (Pl. Ex. 153; R. 1296; Pl. Ex. 154; R. 1396.) There is next in this story, the acquisition of their one-third interest. This appears in Plaintiffs' Exhibit 138; R. 1361. This letter, written by Mr. G. Donald Emigh, an employee of USV, to R. R. Ridgeway, under date of March 22, 1944, concluded as follows:

> "As soon as we have satisfied ourselves concerning the ground to be purchased, its location, etc. we plan on taking immediate steps to purchase as authorized by Mr. Guarin, *because the present time seems to be a propitious one in which to act because of the fact that Curran Bros. & Wade have some $3,000 in outstanding obligations which they must meet.*" (Emphasis added.)

The series of crippling acts, beginning with VCA's connivance with Redington and ending with Wade and Curran's indebtedness after 2 years of selling ore to the MRC

under Hill's contract, culminates in executing what can best be described as a squeeze-play on Wade and Curran, after they had been reduced to a $3,000 indebtedness caused by their transactions with respondents. Wade and Curran in distress sold their remaining one-third interest in Cove Mesa for $12,500. (Pl. Ex. 138, R. 1361.) The papers were signed on April 17, 1944. (Pl. Ex. 151, R. 1395.)

These properties in due course were leased to VCA. VCA extracted from the Cove Mesa deposits (up to the date of the filing of the complaint) 24,000 tons of ore (R. 1401), containing 870,042 pounds of V_2O_5 and 108,974 pounds of U_3O_8. (R. 1402.) The total value of this tonnage was $695,881. The net value was $522,818.23. (R. 1402.)

The high point of the defense occurred with the appearance of General Leslie R. Groves on the stand. But General Groves testified that he would not have approved this transaction "unless the facts had been concealed from me." The interrogation on this phase of the case was as follows (R. 1596-1597):

> "Q. (By Mr. Alioto) Now, let me read it to you again, so we can have it, so the jury will have it clearly in mind what this is about. G. Donald Emigh, an employee of USV, wrote this letter, in which he states:
>
> 'As soon as we have satisfied ourselves concerning the ground to be purchased, its location, etc., we plan on taking immediate steps to purchase as authorized by Mr. Guarin, because the present time seems to be a propitious one in which to act because of the fact that Curran Brothers and Wade

have some $3,000 in outstanding obligations which they must meet.'

Now, was it any policy of yours, Mr. Guarin, that an attempt should be made to——

The Court. General Groves.

Q. (Mr. Alioto) General Groves, I'm sorry, that an attempt should be made to purchase the Wade and Curran properties on the basis of the fact that they were under financial obligations and therefore couldn't deal as effectively as otherwise?

A. I don't believe that any settlement made on that basis would have been approved by Mr. Guarin. If it had come to me, it would not have been approved unless the facts had been concealed from me. On the other hand, if the price had been fair it would have been approved.

Q. In any event, it was certainly no policy to deal with people on the basis of financial distress, I take it.

A. There was no policy to take unfair advantage of anyone, either American or foreign."

So far as Colonel Guarin's participation in the Wade and Curran transaction is concerned, it can be best characterized by Burwell's answer (R. 838):

"A. Yes, but we presented the plans and Paul Guarin, who was just a geologist, would say, 'Here, we better do this,' and he would say, 'I will fix up a letter to get it ready and we will create a plan for this whole business.'"

Thus, in summary, the facts show the following:

1. There existed an acknowledged conspiracy to monopolize the industry by eliminating independent competitors. This the jury and the Appellate Court below found to be

a fact. The Wade group was recognized as independent competition almost immediately, as evidenced by VCA's connivance with a partner "to get rid of Wade and Curran."

Burwell, Vice President of USV and a member of its Board of Directors, gave direct testimony that he was specifically instructed by his superiors to acquire all properties on the Colorado Plateau that could possibly produce vanadium in competition with USV in order to keep them off the American market and that his instructions were to acquire all the properties on the Colorado Plateau that could possibly produce vanadium in competition with the United States Vanadium Corporation. (R. 675.)

VCA likewise had the specific desire to eliminate Wade and Curran as troublesome outsiders who in December, 1941 had acquired Navajo leases. VCA desired the Wade and Curran properties to be "the nucleus of an operation in that area, the ore to go to Monticello." (Pl. Ex. 121, R. 1318.)

2. USV gave VCA a clear field to eliminate Wade and Curran pursuant to the Dry Valley settlements which apportioned that area of the Plateau to VCA.

3. When Curran tried to get competition so as to deal with someone other than VCA, he wrote to USV offering to sell his ore for processing in the Durango plant, and *all USV did with his letter was to surreptitiously turn it over to VCA*, confirming the collaboration between the two.

4. Simultaneously with this effort, USV in its MRC contracts gave Wade and Curran disproportionately low

prices as compared with the first price negotiated with VCA. That is, the jury's verdict had implicit in it the fact that USV used its MRC powers to discriminate in prices between Wade and Curran and VCA for the purpose of building up the one and tearing down the other. In relation to Mr. Nisley the Court below found that USV had utilized its MRC agency against Nisley to further the basic conspiracy between respondents.

5. When Wade and Curran, in confidence, showed Hill their highly mineralized discovery in the Carrizo Mountains, Hill actively connived with Burwell to take the deposit away from Wade and Curran and ultimately did. USV, in the final analysis, used Curran's distress indebtedness of $3,000 as a means of getting them to sell out for $12,500, and VCA and USV caused this indebtedness.

In fixing the damage, the jury was aided not only by the actual tonnage recovered from the same deposit when VCA took over the deposits, but by the following factors as well:

1. The confidential report of Hill setting out his estimates of tonnage.

2. The report of Hill setting out the mining conditions in the area.

3. The price actually paid by USV or by the Manhattan District for other properties on the Plateau.

4. All of the economic factors of the vanadium industry.

5. All of the economic factors of the uranium industry.

6. The defendants' books and records with respect to production, manufacture, and distribution of vanadium and uranium.

7. Costs of production in the business of mining, producing and distributing vanadium and uranium.

8. Profits made in the production, manufacture, and distribution of vanadium and uranium.

The jury had before it the detailed reports as to the Carrizo Mountain claims. (Pl. Ex. 132, R. 1338; Pl. Ex. 133, R. 1343.) Thus the potentials and known valuations of the properties were fully known in 1943 and 1944 and the market values as of 1944 were before the jury. In October, 1943, Mr. Burwell had recommended to Union Carbide that it buy the North Continent properties for $450,000. (Pl. Ex. 230, R. 2414.) A short time later he made a formal report to the Army (UC Ex. 37; R. 853) in which he suggested that the same properties be purchased for $200,000.

D. THE OPINION BELOW

Despite the admission of purpose and intention to exclude Wade and Curran and the evidence of discrimination and harm practiced by respondents on Wade and Curran, the Court below held as a matter of law that the evidence could not support the jury verdict and judgment since the acquisition of the Wade and Curran mining rights was performed under the direction and control of the United States Army through the Manhattan District.

The Court below reached this conclusion despite a jury verdict to the contrary and the following:

1. The evidence was undisputed that during the period 1940 to 1944 Wade and Curran were financially weakened by the combination to exclude them.

2. The loss of their mining rights and their inability to proceed as an independent mining company was directly attributable to the manner in which VCA first and then USV and USV, agent for MRC, dealt with the Wade and Currans.

3. The principles of free enterprise ruled the disposition of valuable mining claims during the period 1942 to 1944 and those that were in sound financial condition held on to uranium properties, no matter how valuable or useful they may have been to the United States or the Manhattan District.

4. The Manhattan District did not exercise eminent domain powers but simply acquired properties as free market buyers.

5. VCA held extensive properties on the Navajo Lands from which the Manhattan District could have explored.

6. The Cove Mesa claims were discovered by petitioners and disclosed to Mr. Hill, USV, and the values obtained by this discovery are directly attributable to petitioners.

7. The plan to acquire the Wade and Curran mining claims originated with Mr. Van Fleet of USV, and was proposed by him to the Corps of Engineers.

8. Colonel Guarin did not seek the approval of the head of the Manhattan District, General Groves, on the Wade and Curran transaction.

9. General Groves testified he would not have approved the transaction.

10. It was against the directives of General Groves to acquire properties based on the financial distress of

citizens; yet this was done here. There is no dispute that the mining claims were acquired because of the financial distress of the Wade and Currans, a financial distress in which respondents placed them as a result of their admitted conspiracy.

11. The respondents VCA and Union Carbide kept all their uranium lands and mining rights free from acquisition by the Manhattan District.

12. The applicable governmental contract provisions provided that Union Mines was to act in "good faith", which was shown not to have occurred here.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT WHICH HAVE HELD THAT THE ANTITRUST LAWS AFFORD REDRESS FOR HARM PROXIMATELY CAUSED BY CONSPIRACIES TO MONOPOLIZE AND A JURY VERDICT SUPPORTED BY SUBSTANTIAL EVIDENCE OF VIOLATION HAVING A NATURAL TENDENCY TO CAUSE INJURY CANNOT BE REVERSED

A. The decision below is in direct conflict with the doctrine of proximate cause applied in antitrust cases by this Court in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927)

This petition presents issues which are allied and similar to those in the case of *Continental Ore Company v. Union Carbide and Carbon Corp., et al.*, No. 304, now pending before this Court. This case presents the issues wherein respondents claim immunity under the antitrust

laws, without benefit of a certificate of immunity, on the basis that admittedly illegal acts were performed under governmental sanction. If petitioners in the *Continental Ore* case now pending before this Court are correct, then petitioners herein have been deprived of a verdict awarded them by a jury in the amount of $600,000 even though respondents were found to have conspired to eliminate petitioners from the vanadium business.

The application of the doctrine of proximate cause is in issue in this case, as it is in the *Continental Ore* case now pending before this Court. The Court below conceded and found that respondents had as their intention the complete monopolization of the vanadium industry pursuant to a conspiracy to monopolize. And it is elementary that "results intended by an actor are proximate if they in fact take place." McLaughlin, *Proximate Cause*, 39 Harvard L. R. 149, 151 (1925). The specific results intended by these conspirators were found to have occurred by a jury and the Court below. Yet the Court granted them immunity without benefit of a certificate of immunity.

The trial Court in the instant case instructed the jury:

> "Now, we come to Wade and Curran. If the defendants—we're still talking about damages—if the defendants conspired to gain control and domination of the vanadium industry and pursuant to that plan or program defendants were able to acquire and did acquire property of the independents as the proximate fruits of that conspiracy, the plaintiffs Wade and Curran may be found to be injured by such acquisition and would be entitled under the antitrust laws to be compensated, *if you find by a preponderance of*

the evidence that the acquisition was pursuant to that conspiracy." (Emphasis added.) (R. 3193-3194.)

The jury so found. The Court below agreed. Yet, the Court below reversed the judgment in favor of petitioners and granted them immunity.

A successful party may sustain its judgment on appeal on any ground that finds support in the record. *Jaffke v. Dunham*, 352 U.S. 280 (1957).

To sustain their judgment petitioners were entitled to the resolution of all factual conflicts, presumptions and inferences, and under such rules of appellate procedure, it must be concluded that the jury found that the proximate cause of petitioners' inability to retain their valuable mining claims and Union Mines' acquisition of these claims was the direct and intended result of the conspiracy to exclude petitioners from the market place.

With just the slightest variation in two words, the language of *Twentieth Century-Fox F. Corp. v. Brookside Th. Corp.* (8 Cir. 1952), 194 F. 2d 846 is completely descriptive of the elimination of petitioners:

> ". . . and that concerted action on behalf of the defendants had the effect of making it impossible for plaintiff successfully to operate its picture theater [mining claims] and in effect drove it out of business, forcing it to sell to a corporation controlled by or participating in the conspiracy or combination created by defendants." (850.)

The manner in which confessed violators of the anti-trust laws inflict their harm on a private business is immaterial once it is conceded that the conspirators and

antitrust violators intended that particular harm to occur. The fact that other forces, even governmental forces, are used as a means to accomplish the combination's purpose of elimination after years of impact from the combination has left its mark is immaterial. Antitrust violators are held responsible for all results they intended to accomplish by their illegal activities.

As stated by Restatement Torts, §915:

> "A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it was expectable, except where the harm resulted from an outside force, the risk of which was not increased by the defendant's act."

In the instant case, respondents intended to acquire petitioners' property and to eliminate them from the vanadium industry pursuant to their overall conspiracy to monopolize this industry. Respondents intended that petitioners lose their properties; intended to exclude them from the vanadium industry. After more than four years of oppression, they were forced to leave the Colorado Plateau with their valuable mining discoveries and rights lost to Union Mines, a wholly owned subsidiary of Carbide, one of the respondents herein, although *no other individuals* lost their mining rights to Union Mines. The financial weakening of the petitioners through deliberate acts of the respondents committed pursuant to respondents' conspiracy to monopolize the vanadium industry was the specific reason for their elimination from the vanadium-uranium mining business and the loss of their valuable mining properties. Respondents were the substantial

factors in causing that financial weakening and petitioners' demise.

Under applicable antitrust and tort principles, respondents are liable to petitioners, in an antitrust conspiracy action, for the results they intended to produce and which were found to have been in fact caused and brought about by respondents' direction and programs.

Hetzel v. Baltimore & O. R. Co., 169 U.S. 26 (1898);

Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946);

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931);

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927);

Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948), *on remand* (9 Cir. 1952) 195 F.2d 622.

In the instant case, two salient factors are to be kept in mind: (1) Respondent-conspirators created the very conditions responsible for the loss of the claims—the financial distress of Wade and Curran. Admittedly, beyond dispute and found to be true as a question of fact by the jury verdict in petitioners' favor, petitioners would not have been the object of any action or proposal on the part of Union Mines, the wholly owned Union Carbide subsidiary, but for petitioners' financial distress. (2) Even assuming Union Mines was directed by the Manhattan District, such governmental intervention was not an independent, superseding force because the intervention was *admittedly* brought about by the active work of Van Fleet (USV), Burwell (USV), Bransome (VCA)

and Hill (USV), all working for the private interests of Union Carbide and VCA. The ⅔-⅓ "subdeal" was made in the name of USV before anyone in the Corps of Engineers knew of it. (R. 1620-1621; 1338-1342.)

Since the evidence was substantial to show that the conspiracy financially weakened Wade and Curran, the conspiracy is liable for all consequences reasonably within its contemplation. The loss of these mineral rights by petitioners was not only within the reasonable contemplation of the parties, *this loss and this intended result was the specific purpose of the combination.*

The evidence showed that, in 1940, VCA planned that Wade and Curran leave the area of their operations. (Pl. Ex. 121; R. 1317.) It induced Redington to leave the Wade and Curran venture at the time VCA took over competitive lands on the Navajo Reservation. (Id.) And finally Bransome, VCA's president, told petitioners that their protest to MRC would be futile. (Pl. Ex. 143; R. 1372.)

As for USV, the evidence is clear that intended and well planned discriminations practiced against petitioners by USV as agent of MRC from May, 1942, to 1944, as part of the conspiracy to monopolize the vanadium industry, accounted for the financial distress which led to petitioners' elimination from the vanadium industry, just as respondents' conspiracy intended.

The blatant fact is that petitioners were paid grossly depressed and grossly discriminatory prices by USV as agent for MRC at the same time USV as agent for MRC was paying its conspirators high prices for the same ore. The Court below has allowed Wade and Curran, as one

of the individual producers in the *Balsley* miner's case, to obtain the difference in price between the price they were paid by USV-MRC and the jury fixed price of 50 cents a pound on the basis that they were injured as a result of the price fixing which was a part of the conspiracy.[27] This 50 cents price was the price that USV-MRC could have paid the miners without MRC approval (UC Ex. 4, R. 773) and was the competitive price the jury found that petitioners would and should have received but for respondents' conspiracy to fix prices. This amounted to $18,661.69. (R. 410.)

It is beyond dispute that Wade and Curran were the subjects of severe discrimination, since at the time petitioners were receiving these low prices, VCA was obtaining payments of 48 cents a lb. for 1.5% ore for Area No. 1.

As the opinion below states, Appendix A, p. 28:

> "One of the negotiated purchase contracts was between USV as agent for MRC and VCA, dated March 11, 1943, providing for the payment of 48¢ per pound, plus hauling allowances for 1.5 percent ore.[5]
>
> [5]Under this contract, VCA sold and delivered to USV, as agents for MRC, 74,322 tons of 1.5% vanadium ore, or 2,229,000 pounds of V_2O_5 for which VCA received $1,333,725."

If petitioners had similarly received this higher price, they would have received an additional $15,000 or $12,000, and would not have been in the financial distress which

[27]5/27/42-7/24/42: 12 cents per lb at 1.5% content
7/24/42-9/17/42: 26 cents at 1.5% content
9/17/42-5/21/43: 30 cents at 1.5% content
5/21/43-2/44 : 35 cents at 1.5% content

forced them to sell their mining rights to Union Mines, Carbide's subsidiary.

The evidence further showed that Van Fleet and Hill, both USV officials, were the persons who directed the acts which caused the financial condition of petitioners and then took advantage of the condition they had caused to eliminate petitioners by presenting plans to the Manhattan District.

We respectfully urge that the jury verdict in favor of petitioners must be sustained on the ground that respondents were the proximate cause of petitioners' elimination from the vanadium-uranium mining and milling business and that but for the illegal practices of the respondents-conspirators in violation of the antitrust laws, petitioners would have retained their valuable mining discoveries worth well over $200,000 in value.

B. The decision below conflicts with the decisions of this Court that private parties may not use Government agency powers as a cloak to exclude others from the market or to conspire or discriminate against others

Just as respondents cannot use the fact that petitioners' properties were purchased by Union Mines for the Manhattan District as a means of avoiding liability for the intended results of their conspiracy, neither can respondents use the excuse of "government agency" to obtain the slightest sort of antitrust immunity. No certificate of immunity was granted to or even applied for by respondents.

No directions to violate the antitrust laws were given to respondents by the government. No authorization of any type whatsoever was given to respondents to violate

the antitrust laws. In fact the evidence was to the contrary. The evidence showed without contradiction that the government directed and *required* respondents to act in good faith and to be liable under any and all federal and state laws for their activities as government agents. Most significantly the evidence showed no governmental direction to conspire or agree or to monopolize. Rather, it showed conclusively that respondents used and breached the trust given them by the government to further their conspiracy and to screen their elimination of petitioners' mining business for their private purposes and gain.

Union Pac. R. Co. v. United States, 313 U.S. 450 (1941);

United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940);

Floyd v. Gage (4 Cir., 1951), 192 F.2d 137;

Bankers Life & Casualty Company v. Larson (5 Cir., 1958), 257 F.2d 377;

Crummer v. Du Pont (5 Cir., 1955), 223 F.2d 238 *cert. denied* 350 U.S. 848.

We respectfully submit that substantial evidence was before the jury which permitted it to draw the following conclusions, which conclusively disallow any judicial grant of antitrust immunity to respondents:

1. Respondents' conspiracy and the plans and programs which were designed to implement that conspiracy and to eliminate petitioners from the vanadium industry were formulated and put into effect prior to the advent of the government's need for uranium.

2. The existence of respondents' conspiracy to monopolize the vanadium-uranium business was not known to

any of the persons in the government who were in charge of the government programs. And respondents made every effort to prevent these officials from knowing these plans. The evidence was uncontradicted that none of the following officials were aware of respondents' conspiracy or their illegal intentions: General Leslie Groves (R. 1592, 1597-1598); Col. Paul Guarin (R. 1633); Major Merritt (R. 1749); J. K. Gustafson (R. 1820-1826.)

3. The actual formulation of the plan to acquire petitioners' property came from Van Fleet of USV and could only be the result of Mr. Hill's investigations of petitioners' discoveries at their confidential invitation. (Guarin, R. 1618; Hill, R. 1333-1348; Pl. Exs. 133, 134, R. 1343, 1349.)

4. The formulation of the plan to acquire the Wade and Curran mining rights came after Union Carbide had received specific knowledge of the potential value of uranium and had determined, as part of the conspiracy, to acquire all promising uranium properties on this Plateau so as to consummate their plans for a total monopoly. By 1943, of course, both VCA and Union Carbide knew of the government's need for uranium oxide. On June 25, 1944, Mr. Viles, the VCA General Superintendent, wrote to his superior, Mr. Bransome, President of VCA:

> "I am grabbing all of the vanadium claims possible on a lease basis, first figuring what the ore will cost us in Naturita regardless of distance, as mining costs have to be governed by the long haul. At present I am tying up the roscoelite claims owned by the Dunnings near Rico, Colorado, for whoever operates the Durango Plant in the future can use this ore. Please correct me if I am wrong in trying to control

as many outside vanadium claims as possible on a lease basis without obligating the company financially." (Pl. Ex. 216; R. 2033.)

On March 21, 1944, Viles had written to Bransome that VCA should acquire property around the Monticello plant.

". . . if only to prevent some outsider getting ideas in regard to the Monticello plant." (Pl. Ex. 36; R. 710.)

On October 21, 1943, Burwell (USV) had written to Van Fleet, Rafferty and Halliday, his superiors, that "with a situation developing in which uranium promises to become the valuable element" Union Carbide should acquire properties "to protect the corporation in its future business in vanadium and uranium." (Pl. Ex. 230; R. 2413-2416.)

In March, 1944, Union Carbide determined to acquire the Durango Government Mill from MRC specifically to prevent "the injection of additional operators in the field". (Pl. Ex. 137; R. 1358.) The letter stated:

"Durango would, furthermore, be the logical place to treat the Uranium ores of the Navajo Indian reservation, as well as those from the McIntyre Canon sector." (Id. R. 1360.)

The evidence showed unmistakably and beyond a doubt that the actual formulation of the plans to acquire petitioners' uranium properties came from companies which sought control of uranium as well as vanadium as part of the conspiracy. These plans originated with defendants, not with the Manhattan District.

5. Respondents' exclusionary policy and purpose to monopolize the vanadium-uranium industry was strictly a private affair which utilized the government agencies to serve their private conspiracy.

In December, 1943, Mr. Nisley, of the independent Nisley & Wilson Mill, after being allowed to visit the Uravan plant by the United States Army, succeeded in working out a process to extract uranium. (R. 1181-1183.) When he reported it to the Army, he "ended up in an office with Mr. Burwell". (Nisley R. 1182.) At that time Burwell told him "I won't permit you to get into the uranium business." (Nisley R. 1183.) Mr. Nisley never did get into the uranium business.

Also indicative of the private purposes of this conspiracy was the evidence that as early as October, 1942, when Burwell, an official of MRC at the time, was apprehended diverting miners away from the Nisley-Wilson independent mill, he summoned Mr. Gardner, one of the operators to his office. (R. 1284.) Burwell thereupon told Gardner that he did not want him to operate the independent mill. (R. 1284.) When Gardner protested that with a war going on, the United States government, which was in dire need of vanadium, would not permit him to close an independent mill, Burwell told him: "I AM THE GOVERNMENT". (Gardner R. 1285.)

And in January, 1943, when Mr. Nisley protested to Hill, another USV officer assigned to the MRC agency, about the long delay in executing his MRC contract, Hill told him:

> "Regardless of what the War Production Board said or what Metals Reserve Company said, my salary is paid by the United States Vanadium Corporation and *they tell me how this is to be handled.*" (R. 1176.) (Emphasis added.)

6. The officers and employees of Union Carbide and VCA were the technical specialists in vanadium and uranium properties and in the production of vanadium products and uranium sludge. The evidence was overwhelming that Van Fleet, Burwell, Bransome, and Viles were the key advisors to the governmental agencies. They were the men with practical experience who were advising the agencies. Respondents were shown to be the originators of schemes and the activities involving competitors and the agencies' relations with the miners.

Mr. Hill, the USV-MRC, Union Mines and USV employee, took his orders directly from Burwell. (R. 1293-1295.) Page Edwards of MRC, clearly took directions from Burwell. (Pl. Ex. 185, R. 1557, 1558.)

Col. Guarin had no experience whatsoever in the vanadium industry. (R. 1631.) Col. Guarin was explicit (R. 1602):

> "We had to turn to civilian organizations and contract this work out to get the staff and qualified people needed to carry out such a project, and I think that is the reason it was contracted. I don't see how it could be done any other way."

Major Merritt testified concerning his negotiations for uranium oxide with the respondents. (R. 1715-1717; 1725-1728; 1743-1744.)

Capt. Leahy, the area engineer for the Guard Central Office for the Manhattan District, had no experience in vanadium and uranium. (R. 2101.) His consultant was Blair Burwell. (R. 2102; see testimony of Mr. Nisley at R. 1180-1183.)

Mr. Gustafson flatly admitted that his knowledge of the vanadium industry came from the two respondents. (R. 1820.) The only informed men were Van Fleet, Burwell, Viles, Bransome, and a Mr. B. Webber, one of the employees of Union Mines, the wholly owned Carbide subsidiary. (R. 1820-1821.) And they were advising and directing the government people in their activities.

7. The elimination of petitioners was clearly consistent with the proven objective of the overall conspiracy between respondents, the acquisition of all vanadium mills and claims, the preventing of "outsiders" from challenging this monopoly and the exclusion of all competition. (Pages 32 to 41 of this Petition.)

8. In assuming that the Manhattan District required petitioners' properties to gain access to the Navajo Reservation for the purpose of conducting extensive surveying the Court decided a question upon which there was a factual conflict and which was a question of fact for the trier of fact. VCA's Navajo leases remained intact and, if desired, VCA properties could have been used as the springboard for surveying, even if the simple intervention of the Bureau of Indian Affairs could not have solved the problem. Col. Guarin could not really explain this. (R. 1624-1627.) Thus the question remains why the two conspirators, VCA and Union Carbide, were allowed to retain their uranium holdings and mineral leases while

private citizens like Wade and Curran were so handled by the agencies being administered by these conspirators that they were required to leave the vanadium-uranium industry? The answer seems clear enough. The evidence showed that respondents' conspiracy had as its objective the acquisition of all vanadium-uranium properties consistent with the common plan drawn in 1933. The government agencies were available to them as means of accomplishing their intended result and they used them for this purpose.

It is respectfully submitted that the learned Court below was in error in holding that the jury could not have concluded from the evidence here that petitioners' discoveries and mining rights were acquired pursuant to the private conspiracy entered into by respondents many years prior to 1944, which conspiracy was implemented by respondents' use of the MRC and Union Mines agencies as instruments to achieve the objectives of their overall conspiracy to monopolize and exclude competitors or potential competitors. The record here is too blatant with antitrust violations to allow judicial exemption of respondents from the antitrust laws.

C. Private corporations are liable for conspiring to eliminate a competitor regardless of the means used. The fact that they use a governmental agency to accomplish or complete this result does not immunize them

1. The decision below conflicts with the decisions of this Court that antitrust immunity or exemption will not be implied or inferred and that even if granted must be specifically limited to the scope of the exemption granted

It has long been established that immunity from the antitrust laws will not be created by implication, but

rather that there must be a specific grant of immunity. *United States v. Borden Co.*, 308 U.S. 188 (1939); *Maryland & Virginia Milk Pro. Ass'n v. United States*, 362 U.S. 458 (1960); *United States v. Radio Corporation of America*, 358 U.S. 334 (1960). "We cannot believe that Congress intended to create so great a breach in historic remedies and sanctions." (Ibid., 308 U.S. 188, 198.)

As stated in *United States v. Borden Co., supra*, "If Congress had desired to grant any further immunity, Congress doubtless would have said so." (p. 201.) And again in *United States v. Socony-Vacuum Oil Co.* (1940), 310 U.S. 150, "For Congress had specified the precise manner and method of securing immunity. None other would suffice." (310 U.S. 226-227.) Whenever Congress has desired to grant immunity, it has specifically stated so and has provided the machinery to invoke such immunity.[28]

Furthermore, when Congress has granted immunity, it has specifically limited the immunity to the *exact* conduct described and the Courts have so construed the grants of

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[28]For example, see the following: Agricultural Adjustment Act of 1933, Sec. 8(2); 48 Stat. 34; as amended see 7 U.S.C. Sec. 608b; Agricultural Adjustment Act Amendment of 1935, Sec. 57; 49 Stat. 781; Capper-Volstead Act, Sec. 2; 42 Stat. 338; 7 U.S.C. Sec. 291; The Interstate Commerce Act, Sec. 5a; 62 Stat. 472; 49 U.S.C. Sec. 5b; Federal Aviation Act of 1958, Sec. 414; 72 Stat. 770; Communications Act of 1934, Section 313; 48 Stat. 1087; Webb Export Trade Associations Act, Section 2; 40 Stat. 517; Atomic Energy Act of 1954, Sec. 105; 68 Stat. 938, 42 U.S.C. Sec. 2135 (the Act of 1954 amends and supersedes that of 1946 which contained substantially similar provisions. Both Acts *specifically* provide for antitrust liability); Small Business Mobilization Act of June 11, 1942, Sec. 121; 56 Stat. 357; Small Business Act of 1958, Sec. 11; 72 Stat. 394; Defense Production Act of 1950, as amended, Sec. 708(b); 69 Stat. 581, 50 U.S.C. App. Sec. 2158.

immunity. *Atchison, Topeka & S. F. Ry. Co. v. Aircoach Transport Ass'n.* (D.C. Cir. 1958), 253 F.2d 877, *cert. denied,* (1960) 80 S.Ct. 372.

Similarly, as stated by this Court in *Maryland & Virginia Milk Pro. Ass'n. v. United States, supra,* the full effect of the immunity provision involved was that although a group of farmers acting together could not be restrained:

> "... 'from lawfully carrying out the *legitimate objects* thereof' (emphasis supplied), ... the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will. (Cases cited)." (pp. 465-466)

2. A private corporation is not immune from the antitrust laws because it has an agency agreement with the government if it unlawfully uses its agency powers to violate the antitrust laws

Private corporations such as Union Carbide and VCA are not immune from the antitrust laws if they conspir to viol. te the antitrust laws, and if, as part of that conspiracy, they unlawfully use an agency agreement which one of their subsidiaries has with the government, to eliminate a competitor. Private corporations which undertake, through subsidiaries or otherwise, to assume certain functions as agencies of the government are themselves responsible for their own tortious conduct when that conduct conflicts with the antitrust laws. *Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transport Ass'n.* (D.C. Cir. 1958), 253 F.2d 877, cert. denied 361 U.S. 930 (1960); *State of Georgia v. Pennsylvania,* 324 U.S. 439 (1945); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *Kobe, Inc. v. Dempsey Pump Co.* (10 Cir. 1952), 198 F.2d

416, cert. denied 344 U.S. 837 (1952); *Bankers Life and Casualty Company v. Larson* (5 Cir. 1958), 257 F.2d 377; *Floyd v. Gage* (4 Cir. 1951), 192 F.2d 137; *Crummer Co. v. Dupont* (5 Cir. 1955), 223 F.2d 238, cert. denied 350 U.S. 848; *United States v. Deutsches Kalisyndikat Gesellschaft* (S.D. N.Y. 1929), 31 F.2d 199.

In the *Atchison, Topeka* case, *supra*, the Court held that even though it should be found that the agreements involved therein were within the immunity section and an antitrust immunity certificate obtained, they nevertheless would be held as violations of the antitrust laws *if the agreements were part of a plan of the defendants in combining or conspiring to eliminate the competition of plaintiffs.* The Court held:

> *"Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition of Aircoach, rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9)."* (p. 887)

Again, in *United States v. Deutsches Kalisyndikat Gesellschaft*, supra, which was an antitrust case, the Court held (p. 202):

> "Nor can immunity be claimed by the defendant corporation, or on its behalf, or by or on behalf of any of its officers, agents, or employees, on the ground that they are acting as agents of a foreign government. *An agent does not cease to be answerable personally for his illegal acts because he is an agent, even though he may be an instrumentality of govern-*

ment. Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corp., 258 U.S. 549, 567, 42 S.Ct. 386, 66 L.Ed. 762. . . ." (Emphasis added.)

Legal means may not be used to accomplish an illegal objective. (*American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Socony-Vacuum Oil Co.*, supra.) And if a combination or conspiracy taken as a whole violates the antitrust laws, it is not purged of its unlawfulness just because part of it may be valid. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *American Tobacco Co. v. United States* (6 Cir. 1944), 147 F.2d 93; *Aikens v. Wisconsin*, 195 U.S. 194 (1904).

That a person cannot use lawful activity in an unlawful manner for an unlawful purpose and for an unlawful end and still have antitrust immunity was again reiterated in *Maryland & Virginia Milk Pro. Ass'n. v. United States*, *supra.* The Court held the conduct complained of constituted anticompetitive activities so far outside the "legitimate objects" of a cooperative that, even if proved, it would constitute a clear violation of Section 2 of the Sherman Act.

In *United States v. Griffith*, 334 U.S. 100 (1948), this Court held (p. 107):

> "It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor, is unlawful."

The contract between Union Mines and the Corps of Engineers involved in the case at bar is not a general certificate of immunity. Even assuming *arguendo* that the

contract can be construed to grant immunity for some of respondents' acts, it must be construed according to the specific purposes of the Manhattan District and the specific allowances granted in the contract.

Obtaining properties containing uranium bearing ores was clearly not an "emergency". In 1943-1944, the bulk of uranium ores came from foreign countries. The government obtained only a small amount (10%), from the Colorado Plateau. (R. 1582.) No substantial amounts of uranium bearing ores were acquired by the Manhattan District. (R. 1582.) Uranium bearing tailings were acquired rather than ore. (R. 1582.) Thus it is clear from the evidence that there was no great need for uranium bearing ore lands, but rather, that the government was essentially interested in tailings. The tailings, of course, had been accumulated by respondents over a period of many years from their vanadium oxide milling operations.

Further, the Manhattan Project expected Union Mines to "explore" and "discover" as the primary aim. The learned Court stated below:

> "The evidence is undisputed to the effect that Manhattan instructed USV-Union Mines to gain access to the Navajo Reservation for the purpose of conducting extensive explorations for uranium on a large area." (Appendix A, p. 79.)

We respectfully submit that respondents have erroneously been given antitrust immunity as to an exclusionary purchase when the scope of their governmental activities did not involve "purchase" for the purpose of such private exclusionary plans. But even if governmental immunity attached to the Union Mines contract with the

Corps of Engineers it would be limited only to acts performed in "good faith". (UC Ex. 17, R. 797.) This record shows that respondents were not in "good faith", for they had embarked upon and carried out an exclusionary conspiracy, and their acts as government agents were directed toward that end. Further, it was beyond the scope of the Manhattan District's policies and directives to utilize financial distress as the means of obtaining a private citizen's property. As General Groves testified:

> "Q. You didn't instruct them, did you, General, to take advantage of anybody's financial situation to pay a lower price than the claim was worth?
>
> A. I instructed them just as I told you, fair to both sides." (R. 1594.)

We respectfully urge then that the record shows conclusively that petitioners' elimination by respondents was in "bad faith" and contrary to the policies of General Groves. This exclusion was not necessitated by urgent war time emergency. The learned Court permitted respondents an exemption far beyond any legitimate allowance that may be contained in the contract between Union Mines and the Corps of Engineers.

D. The decision below conflicts with a just and reasonable interpretation of the record as required by this Court in Story Parchment Co. v. Paterson Parchment Paper Co.

The learned Court below distinguished petitioners' action from the Nisley action on the premise that in Wade and Curran,

> ". . . they lacked the power to commit the acts of which they are accused because of the positive intervention of governmental action." (Opinion, Appendix A, p. 81.)

But we respectfully submit the record does not support this conclusion. The Wade and Curran transaction did not have the approval of General Groves. He testified that if the Wade and Curran matter had come to him, he would not have approved it. General Groves testified:

> "Q. Now, was it any policy of yours, General Groves * * * that an attempt should be made to purchase the Wade and Curran properties on the basis of the fact that they were under financial obligations and therefore couldn't deal as effectively as otherwise?
>
> A. I don't believe that any settlement made on that basis would have been approved by Mr. Guarin. If it had come to me, it would not have been approved unless the facts had been concealed from me. On the other hand, if the price had been fair it would have been approved.
>
> Q. In any event, it was certainly no policy to deal with people on the basis of financial distress, I take it.
>
> A. There was no policy to take unfair advantage of anyone either American or foreign." (R. 1596, 1597.)

As to Colonel Guârin, the jury had before it positive evidence that Burwell testified that Col. Guarin was an individual who would merely approve the plans formulated by Burwell. Burwell testified:

> "A. Yes, but we presented the plans and Paul Guarin who was just a geologist, would say, 'Here, we better do this,' and he would say, 'I will fix up a letter to get it ready and we will create a plan for the whole business.'" (R. 838.)

Thus, the jury could reasonably conclude, as it did, that petitioners' elimination originated with the conspirators. The learned Court below was required to support the

judgment by giving petitioners all inferences and presumptions and it could not adopt an approach inconsistent with such an interpretation of the evidence. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943); *Ellis v. Union Pacific Ry. Co.*, 329 U.S. 649 (1947); *Lavender v. Kurn*, 327 U.S. 645 (1946).

E. The action of the Court below in reversing the jury verdict and judgment in favor of petitioners violates the rule that resolution of questions of fact are for the trier of fact and not an Appellate Court

Respondents were entitled to a reversal of the judgment entered upon the jury verdict in the Trial Court only if not supported by substantial evidence, giving to petitioners the benefit of all conflicts in the evidence and all the presumptions and inferences that could reasonably be drawn from the evidence, considered in the light most favorable to petitioners. *Gunning v. Cooley*, 281 U.S. 90 (1930).

The action of the Trial Court in reversing a jury verdict on the basis that the United States government directed all respondents' acts in relation to petitioners is in direct conflict with this rule and with this Court's opinion in *Beacon Theatres, Inc. v. Westover*, 395 U.S. 500 (1959) which states that the "maintenance of a jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). In effect, the Court below deprived petitioners of a trial by jury contrary to the Seventh Amendment of the Constitution.

Appellate Courts are not to search the record to take cases away from the jury. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943); *Ellis v. Union Pacific Ry. Co.*, 329 U.S. 649 (1947); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

As stated in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943) by Mr. Justice Murphy:

> ". . . The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury; it is for the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions, that which it considers most reasonable . . ."

The right of the jury to select from conflicting inferences and conclusions that which it considers most reasonable is a right which cannot be ignored, whether it relates to causation, impact, damages or any other issue which is in conflict. *Tennant v. Peoria & P. U. Ry. Co., supra* at 321 U.S. 35; *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

In *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U.S. 407 (1953) this Court stated:

> "The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury."

The issue as to whether respondents where acting pursuant to a private conspiracy or under directions by the government was strictly a factual one. At the trial, petitioners claimed that they were the victims of an overall conspiracy to monopolize the entire vanadium-uranium industry. Respondents denied this and claimed that they were acting under directions from the government. Thus, the issue was a factual one which was presented squarely to the jury pursuant to the Court's instructions: Did defendants conspire to monopolize and was that conspiracy the proximate cause of the loss of petitioners' property rights and elimination.

The Honorable Court below simply analyzed the entire record and made its own factual finding on this issue. A reading of this brief and of the Court's opinion reveals without any doubt that the evidence and the presumptions and inferences that may properly be drawn from this evidence support the conclusion reached by the jury that respondents were acting pursuant to private conspiratorial plans and that petitioners' claims were acquired pursuant to this conspiracy and not under government direction.

Certainly in reaching its conclusion the Court below did not review the evidence as a whole nor did it allow petitioners the benefit of all that their evidence showed. It is inconsistent for the Court to hold that respondents used one agency, the MRC agency, to further their monopolistic purposes and then to hold that they did not use another agency to eliminate petitioners, especially in view of the lower Court's finding and agreement with the jury that respondents were engaged in an overall conspiracy to

monopolize which specifically intended the exclusion of all competition, petitioners included.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari ought to be granted.

Dated, March 23, 1962.

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(Appendices Follow.)

Appendix A

United States Court of Appeals
Tenth Circuit

May Term—1961

Union Carbide and Carbon Corporation and Vanadium Corporation of America, Appellants, vs. Frank Nisley, Jr., et al., Appellees.	No. 6319
Union Carbide and Carbon Corporation and Vanadium Corporation of America, Appellants, vs. John F. Wade, et al., Appellees.	No. 6320
Union Carbide and Carbon Corporation and Vanadium Corporation of America, Appellants, vs. Howard Balsley, et al., Appellees.	No. 6321
Union Carbide and Carbon Corporation and Vanadium Corporation of America, Appellants, vs. Unnamed Plaintiffs, Appellees.	No. 6322

Appeal from the United States District Court for the District of Utah, Central Division

Richard J. Archer and Dennis McCarthy (Herbert W. Clark, Howard M. Downs, Douglas C. White, Richard H. Floum and Paul E. Homrighausen were with them on brief) for appellant Union Carbide Corporation.

J. G. Holland (Robert P. Davison, William C. McClearn, Edward R. Meaher, Calvin A. Behle and Keith E. Taylor were with him on the brief) for appellant Vanadium Corporation of America.

Joseph L. Alioto (Maxwell Keith, Richard Saveri, Guido Saveri, G. Joseph Bertain, Jr., and Walter F. Calcagno were with him on brief) for appellees.

Before MURRAH, Chief Judge and BRATTON and PICKETT, Circuit Judges.

MURRAH, Chief Judge.

Union Carbide and Carbon Corporation and
Vanadium Corporation of America,

vs.

Howard Balsley, et al.

These consolidated appeals are from separate judgments in private Section-4 antitrust suits against defendant-appellants. 38 Stat. 731, 15 USC 15. Each of the suits is based upon the same alleged 20-year combination and conspiracy under Sections 1 and 2 of the Sherman Antitrust Act, to monopolize, attempt to monopolize and restrain interstate trade in the source, production and processing of vanadium-bearing ore on the Colorado Plateau, and the interstate marketing of its metallurgical products. Each of the plaintiffs claim damages for injury to his business and property by reason of the predatory effects of the alleged master conspiracy. The suits largely involve common issues of fact and law, and were consolidated for trial.

The complaint in the so-called Balsley case (No. 6321) states the basic combination, conspiracy and operative facts common to all of the cases. It is cast in two counts.

Count one is by thirty-six named independent ore miners on the Colorado Plateau who mined and sold vanadium-bearing ore to defendants during all or a part of the alleged combination and conspiracy, and who complain of injury by reason of alleged monopolistic and conspiratorial price-fixing practices of the defendants. The second count of this complaint is a class action under 23(a)(3) F.R.Civ.P., in which the plaintiff-miners in count one seek to enforce the several rights of the same class of unnamed independent miners on the Colorado Plateau.

On the latter count, the factual question of the existence of the conspiracy and its total impact on the class was submitted to the jury, leaving to the court the function of assessing the amount of damages to any member of the class after notice and hearing. The defendants have perfected an interlocutory appeal under Section 1292, 28 USC, 72 Stat. 348, from an order on a jury verdict in favor of the class, in which they challenge the propriety of the class action, and that matter will be hereinafter fully considered.

In Number 6319, Nisley and Wilson are independent millmen on the Plateau, who claim to have been injured in their business and property by reason of the impact of the combination and conspiracy. Wade and his co-plaintiffs in Number 6320 were millmen, who also operated mining claims on the Plateau. They claim to have been injuriously excluded from competition with the defendants by force of the alleged monopoly and conspiracy.

To each of the separate claims, appellants have pleaded the 4-year statute of limitations as a bar to recovery. §4B Act of July 7, 1955, 69 Stat. 283; 15 USC 15b. The

applicability of the statute of limitations involves a complexity of statutory suspension, tolling and tacking, relied upon by plaintiffs to avoid the statutory bar and to sustain recovery for all matters complained of from 1938 to the filing of the suits in 1958. Since the incidence of the statute of limitation goes to the heart of the right of recovery, we shall first consider the measure of its applicability.

The combination and conspiracy is alleged to have been formed in 1933, and recovery thereon was allowed from 1938 to the date of the filing of the suits. When the suits were filed, Section 4 of the Clayton Act had been amended in 1955 (69 Stat. 283, §4B, 15 USC 15b), to provide a uniform 4-year statute of limitations to actions arising thereunder, and providing also that no cause of action barred under existing law on the effective date of the Act (January 7, 1956) shall be revived. And, Section 5 of the Clayton Act, as amended in 1955, provided in presently material part that:

> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; Provided, however, that whenever the running of the statute of limitations in respect of a cause of action arising under Section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced

either within the period of suspension or within four years after the cause of action accrued."

From this it follows that the right to recover damages accruing by reason of the alleged conspiracy prior to June 1954 is barred, unless the running of the statute is suspended by the pendency of a criminal information against these defendants filed in September 1948, and terminated on June 2, 1957. These suits were filed within one year after termination of the information, and the appellees rely upon its pendency and a prior indictment against the same defendants filed in June 1946, and dismissed on the date of the filing of the criminal information in September 1948. To further toll the statute beyond the pendency of the indictment and subsequent information, appellees invoke the so-called 1942 war-time tolling statutes, 56 Stat. 781, as amended, 59 Stat. 306, under which all statutes of limitation applicable to antitrust violations were suspended until June 30, 1946.

If, as the trial court held, these asserted private rights of action can be said to be "based in whole or in part on any matter complained of" in the criminal information together with the indictment, and the war-time tolling statutes are applicable, they cumulatively operate to toll or suspend the running of the 4-year statute to October 10, 1942, and thus allow recovery for the actionable period laid in the suits, i.e., 1938 to 1958. But, appellants earnestly contend that their plea in bar should have been sustained because these suits are not based in whole or in part upon the information or the indictment, and in any event, the indictment cannot be tacked to the information so as to suspend the bar beyond the pendency of the information.

In the first place, they say that under prevailing law, in order for the private suits to be based in whole or in part on the information, the matter complained of therein must be "virtually identical" to the matter complained of in the information, i.e., the private litigants must rely not only upon the same general conspiracy, but upon the same means to achieve the same objectives of the same conspiracy. In sum, the appellants take the position that the words "private right of action" in Section 5(b) means an overt act committed in furtherance of a general conspiracy, and the words "based in whole or in part on any matter complained of" means in whole or in part of any such overt act complained of in a government proceedings; and that the criminal information is therefore ineffectual to suspend the running of the statute of limitations against any overt act or right of action asserted in the private suits which are not identifiable in the information. Making application of this admittedly strict construction of the statute, and considering each overt act as a "private right of action", they point out that the asserted rights of action and the information do not coincide either with respect to time or subject matter.

It is apparently true, as appellants suggest, that alleged overt acts in furtherance of the conspiracy prior to December 13, 1941, were not chargeable in the indictment or information. And, it is true of course that overt acts occurring after June 1, 1946, were not within the indictment filed on that date, or within the information, which did not charge any subsequent overt acts. Nor did the information complain of the activities of the defend-

ants, while acting as agent of the government under a contract with a government agency known as the Minerals Reserve Company; nor of a conspiracy to monopolize or restrain trade in the uranium content of the ore, as did the private suits. Neither did it complain of the monopolization or conspiracy to monopolize vanadium ore claims nor of individual monopolization or individual attempts to monopolize.

Antitrust actions of this kind are, to be sure, concerned with overt acts done in furtherance of the injury complained of, and there is good authority for construing the statutory words "based in whole or in part on any matter complained of" to mean overt acts complained of by the United States in a government suit. See Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190. This interpretation of the critical words is said to be supported by Congressional history of the legislation, and by the preceding and related Subsection (a) of Section 5, which provides in substance that a final judgment or decree rendered in a criminal prosecution under the antitrust laws to the effect that a defendant had violated such laws, shall be prima facie evidence against such defendant in any suit or proceedings brought by any party against such defendant under such laws as to all matters respecting which the judgment or decree would be an estoppel as between the parties thereto. Construing the two paragraphs together (5(a) and 5(b)), and making application of the general rules of estoppel, it is suggested that since a final judgment in a government suit would be admissible as evidence in a private suit only as to matters complained of and decided in the government suit, the run-

ning of the statute of limitations with respect to matters not complained of would not be suspended. See Steiner v. 20th Century-Fox Film Corp., supra.

The two paragraphs are indeed complementary and should be construed together. See Sun Theatre Corp. v. RKO Pictures, 213 F.2d 284; Fifth & Walnut, Inc. v. Loew's, Inc., 178 F.2d 587, 593. But, we do not think they are necessarily coextensive in their frame of reference. The purpose of the first paragraph of Section 5 was "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the government in antitrust actions;"; and "to that end to confer, subject only to a defendant's enjoyment of its day in court, against a new party as large an advantage as the estoppel doctrine would afford had the government brought suit." Emich Motors v. General Motors, 340 U.S. 588.

The corollary purpose of the tolling provisions of the second paragraph of Section 5 is to vouchsafe the intended benefits of related government proceedings by suspending the running of the statute of limitations until the termination of the government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit.[1] The competency of a government

[1]Senate Report No. 619, June 21, 1955, states in part: "• • • There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and

judgment in a private suit is necessarily restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited.

Making application of the estoppel doctrine in a private antitrust suit, which alleged that the monopolistic acts and practices of defendants in a local area were steps in the perpetration of a broad nation-wide conspiracy between and among the defendants, we sustained the trial court's admission of the final judgment in the nation-wide conspiracy case as prima facie evidence of the existence of such conspiracy and its localized impact upon the business of the private plaintiff. Loew's, Inc. v. Cinema Amusements, 210 F.2d 86. See also Twentieth Century Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846. Sun Theatre Corp. v. RKO Radio Pictures, supra, seems contra, i.e., see 213 F.2d at page 290. But even so, we do not think the tolling provisions of the second paragraph of Section 5 are confined to or governed by the evidentiary rules of estoppel, necessarily prevalent in the first paragraph.

If we accept the appellants' interpretation of Section 5(b), a Section 4 plaintiff would be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit.

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file his complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings. * * *" U. S. Code Congressional and Administrative News, 84th Congress, 1st Sess., page 2328, 2332.

This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants. We do not think Congress intended any such result. Rather, we think Section 5(b), as amended, was intended to suspend the running of the statute on a Section-4 claim during the pendency of a government-instituted suit which complained of all, or a part of the means relied upon by the private plaintiff to effectuate the same general combination and conspiracy.

These private suits alleged substantially the same conspiracy against the same defendants as in the government suit. They relied upon the same documentary and oral proof to establish the conspiracy, and they also relied "in part" on the same means for the effectuation of the same conspiracy. There was substantial identity of subject matter, and this was sufficient to suspend the running of the statute.

The criminal information was filed on the date the indictment was voluntarily dismissed. The information alleged substantially the same combination and conspiracy against the same parties and substantially the same means for its effectuation. From the time of the filing of the indictment on June 1, 1946, until the termination of the suit on the information, there was pending a government-instituted antitrust suit on which these private suits were based in part, and they operated to suspend the running of the statute of limitations as to such suits.

The appellants claim that the war-time tolling statutes, supra, were superseded by the enactment of the 4-year federal statute of limitations, and were therefore inoper-

ative to toll the running of the statute beyond the filing of the criminal indictment in June 1946. They point to the expressed Congressional concern over the prolongation of antitrust litigation by virtue of the war-time tolling statute, and the disparity brought about by the application of state statutes of limitation. And, they assert the Congressional purpose of the 1955 Amendment was to supersede both the war-time statute and the state statutes. In order to curtail undue prolongation of litigation, the 4-year statute expressly provided that no action barred under existing law on the effective date of the 1955 Amendment would be revived thereby. But we can discern no Congressional purpose to bar any right of action which subsisted by virtue of existing law on the effective date of the Amendment. Indeed, one of the declared purposes of 5b (see Footnote 1) was to "extend the tolling period not only for the duration of the government's antitrust suit, but for one year thereafter." Under the proviso in 5(b), supra, a suit to enforce a cause of action under Section 4 is not barred if commenced "either within the period of suspension [i.e., during the pendency of the government suit and one year thereafter] or within 4 years after the cause of action accrued."[2] These suits

[2]Senate Report No. 619, which accompanied the 1955 Amendment, states in pertinent part: "• • • The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency of a Government antitrust proceeding, he would be required to bring his action either (a) within the suspension period, i.e., within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued. • • •" U. S. Code Congressional and Administrative News, 84th Congress, 1st Session, p. 2338, 2333.

having been commenced within the period of suspension, i.e., one year from the date of the termination of the information, the 4-year statute was inoperative during that period. See Goodfriend v. Kansas City Star Co., 158 F. Supp. 531; April v. National Cranberry Assn., 168 F. Supp. 919. In that respect, our cases are factually different from Herman Schwabe, In. v. United Shoe Machinery, 274 F.2d 608; United Shoe Machinery v. International Shoe Machinery Corp., 275 F.2d 459, where the private suits were commenced more than one year after the termination of the government suits, and the 4-year statute became applicable to the asserted causes of action.

The United States Vanadium Corporation and Electro Metallurgical Company, wholly owned subsidiaries of Union Carbide, were dismissed from the pending criminal information on May 21, 1956. The appellants contend that the information thereupon ceased pending against these two defendants, and inasmuch as no private suit was filed against them within one year from the date of termination, the 4-year statute is applicable to all matters complained of against them; that such statutes of limitation are available to the parent corporation; and that having raised the statute as a defense, the trial court erroneously refused to apply it. In other words, Carbide contends that it may be held liable without regard to the statute of limitations running against its subsidiary "only if it actively participated in the conspiracy."

In United States v. United States Vanadium corporation, 230 F.2d 646, we held that the criminal proceedings against these particular defendants abated upon their dissolution and merger with the parent corporation. Melrose

Distillers v. United States, 359 U.S. 271, seems to be to the contrary. But, we have no need to decide whether under that case the running of the statute was suspended during the pendency of the information against the parent defendant, for the actions surely terminated when they were dismissed on May 21, 1956. From that date there was no pending government suit against these defendants to suspend the running of the statute as against them. And, since these suits were not commenced within one year after the termination of the government suits, the 4-year statute applies, unless, as the appellees concede, Union Carbide actively participated in the conspiracy.

Without detailing the pertinent evidence at this stage of the appeal, suffice it to say that there was evidence tending to show that these two wholly owned subsidiaries, together with other subsidiaries, were actually incorporated departments or divisions of the parent corporation, by which it carried on an integrated business of mining, processing, converting and marketing vanadium-bearing ore and its refined products. It was not the purpose of the statute of limitations to require the plaintiffs to institute suit against these dissolved corporations in order to avoid the running of the statute as to acts committed in their name while under the direction and control of the parent corporation.

Appellants take the further position that in any event, the asserted claims were barred by applicable state statutes of limitation. The theory seems to be that the state statutes of limitation which were applicable and suspended on the effective date of the Amendment in January 1956, thereupon commenced to run on that date, and operated

to bar the actions when these suits were commenced in June 1958. The simple and conclusive answer is that even before the 1955 Amendment and the advent of the uniform 4-year statute, the second paragraph of Section 5 of the Clayton Act (38 Stat. 731) operated to suspend the running of all statutes of limitation in respect to each and every right of action which was based in whole or in part on any matter complained of in a government suit. And since, as we hold, the pending information and indictment operated to suspend the running of the statute on these asserted causes of action until one year after termination of the information, they were not barred when the 1955 Amendment became effective. And, since these suits were commenced within the 1-year period, they are not barred by any statute of limitation, state or federal.

We agree with the trial court that the 4-year federal statute of limitation is applicable; that it was suspended from June 4, 1958 back to June 1, 1946 by the pendency of the government suits; tolled from June 30, 1946 back to October 10, 1942 by the war-time tolling statute; and therefore all causes of action accruing before October 10, 1938 are barred.

This brings us to the merits of the cases. Since the Balsley action presents the central issues on appeal, we will first consider the points raised in that case.

SOME BASIC AND COMMON FACTS

Carnotite and roscoelite ore, found in paying quantities on the Colorado Plateau, contain both vanadium and uranium. When vanadium is processed and reduced into ferrovanadium, it is useful in the manufacture of alloy

steel, and is sold primarily to steel companies in competition with other ferroalloys. Vanadium-bearing ore is first milled and processed into vanadium oxide (V_2O_5)—usually at mills or plants located in the mining vicinity—and in this form has no commercial utility. It is then shipped to reduction plants in the Eastern part of the United States where it is converted into ferrovanadium and sold in that form to the steel industry. In the forepart of this alleged conspiracy, and prior to the advent of atomic energy, uranium was used primarily in the ceramic industry, and only high grade uranium ore was marketable for that purpose. The prime element of carnotite and roscoelite ore was vanadium, and in the milling process to produce vanadium oxide, the uranium was discharged as tailings or refuse.

The Vanadium Corporation of America (VCA) was the pioneer and principal producer of ferrovanadium until the Union Carbide and Carbon Corporation (UCCC) entered the industry in 1926. From about 1911 until about 1932, VCA obtained most of its raw material from a high grade vanadium mine in the Republic of Peru. In the beginning, the ore bodies yielded about 50 percent V_2O_5 and the ore was shipped directly to VCA reduction plants in the State of Pennsylvania, where it was smelted and refined directly into ferrovanadium. As mining progressed down through the ore bodies, however, the vanadium content diminished until by 1930, the ore yielded less than 10 percent V_2O_5, and it became necessary to fuse the ore before reducing it to ferrovanadium. This intermediate process took place originally in Peru at the mine site on an experimental basis and at the reduction plant in

Pennsylvania. Because of the diminishment of vanadium content in the ore, and depressive market conditions, VCA ceased to operate its Peru mine in 1931, and for a year or two thereafter supplied its market demand from inventory of fused oxide and ferrovanadium. About this time, VCA acquired vanadium ore deposits and an oxide mill on the Colorado Plateau at Naturita, Colorado, but apparently did not mine the ore or operate the mill until 1940.

Meanwhile, and in 1926, UCCC, after a survey of the available supply of vanadium-bearing ore on the Colorado Plateau and the potential market for ferrovanadium in the steel industry, purchased extensive ore deposits and a vanadium oxide mill at Rifle, Colorado. The Rifle mines and mill were acquired in the name of the wholly owned United States Vanadium Corporation (USV). It also acquired a ferrovanadium plant in Ohio, which it later transferred to its wholly owned Electro Metallurgical Company (Electromet). And still later, it acquired other similar plants in the Eastern part of the United States. It marketed the ferrovanadium to the steel industry through the Electro Metallurgical Sales Corporation (Electromet Sales), another wholly owned corporation.

In 1932, the USV Colorado mines and mill were closed due to an oversupply (between 3,000,000 and 4,000,000 pounds) of vanadium oxide which was stored at the Colorado plant. In 1933, Electromet sold to VCA 1,000,000 pounds of vanadium oxide (V_2O_5) for 80¢ a pound, to be delivered in monthly quantities before December 1934. From 1932 through 1939, VCA purchased from Electromet a total of 2,825,583 pounds of vanadium oxide, which was

approximately 20 percent of its then current requirements. In 1936, USV constructed a vanadium oxide mill at Uravan, Colorado, 13 miles from VCA's dormant plant at Naturita. And, in 1938, the capacity of the Uravan plant was doubled, with structural steel furnished by VCA.

With an upsurge in market demand due to national defense and export requirements in 1937, VCA increased its imports from Peru, and in mid-1940, activated its mine and oxide plant at Naturita. In 1942, VCA constructed a vanadium oxide plant for the United States government at Monticello, Utah, and operated it under an agreement with the Metals Reserve Corporation, a United States government agency, until February 1944; and again from February 1945 until April 1946. Also in 1942, USV rebuilt and reactivated its Rifle plant and constructed another plant for the United States government at Durango, Colorado, which it operated until June 1948, at which time the plant was leased by VCA. From 1939 to 1942, USV mined and processed ore from deposits belonging to and controlled by VCA and delivered the vanadium oxide to VCA under a toll agreement for 65¢ and 75¢ per pound.

Approximately 90 percent of the ore milled by USV at its plants came from its own mines. About 70 percent of the ore milled by VCA at its plants came from its own mines. The remainder of the ore was purchased from independent miners on the Colorado Plateau, such as the plaintiffs in the Balsley group. From the very outset, and until 1942, the operating mills on the Colorado Plateau paid identical prices, i.e., 21¢ a pound, for 2 percent vanadium ore. In 1942, the price was simultaneously

increased by both companies to 31¢, and this basic uniform price prevailed on the Colorado Plateau until the filing of this suit in 1958. From 1933 to at least 1948, most of the vanadium-bearing ore mined on the Colorado Plateau was milled in plants which were either owned or operated by one of the two companies. The product of these plants, that is V_2O_5, was sold on identical price schedules, except sales or interchanges between the two companies. During all of the period complained of (1938 to 1958), VCA and UCCC, through its subsidiaries, controlled almost 100 percent of the ferrovanadium market, with approximately 66 percent to VCA and the remainder to Electromet. These sales were made to the steel industry on identical price schedules under yearly "requirement contracts".

In sum, it may be taken as an established salient fact that from 1938 until 1948, most all of the domestic vanadium-bearing ore was produced on the Colorado Plateau; that approximately 80 percent of such ore was mined from properties owned by the two companies; and that most of the ore was milled in vanadium plants owned or operated by one of the two companies. Almost all of the vanadium oxide was converted to ferrovanadium in plants owned by the two companies. The two companies controlled the market for ferrovanadium which was sold to the steel companies on requirement contracts at identical prices. From this it is fair to say that the appellants possessed monopolistic and price-fixing powers to bring about the combination and conspiracy complained of in the complaint. Our first question is whether they used those powers for the predatory and unlawful purposes complained of.

EVIDENCE OF COMBINATION AND CONSPIRACY

There was competent evidence in support of the alleged combination and conspiracy to the effect that UCCC entered the vanadium field in 1927 for the avowed purpose of exploiting ferrovanadium as a steel alloy. Its integrated corporate structure was designed to mine, mill, produce and sell vanadium to the steel industry at prices which would enlarge the market in competition with other alloys; and, that by pursuing this aggressive policy in a depressed market, it built up a large inventory of vanadium oxide at its Rifle plant. And, it being no longer profitable for VCA to import Peru ore for its depleted markets, there could be nothing sinister about its purchase of 1,000,000 pounds of USV's surplus oxide to supply its market for ferrovanadium. At 80¢ a pound, over a cost of about 40¢ or 50¢, the transaction was profitable and advantageous to USV—indeed, mutually advantageous.

From the evidence in the record, it is fairly inferable, however, that contemporaneously with the USV-VCA sale in 1933, USV was faced with the alternative whether it would lower the price of oxide and ferrovanadium and attempt to garner a greater share of the alloy market, and perhaps eliminate VCA as a competitor, or negotiate and cooperate with VCA as a friendly competitor. And, it is fairly inferable that it finally resolved to pursue the latter course. There was evidence of friendly negotiations between the two companies concerning centralized mining and milling of the oxide on the Colorado Plateau. The negotiations went so far as to contemplate the reconstruction of VCA's Naturita dormant mill, to be operated by

USV; and that it was finally decided to construct the mill at Uravan, 13 miles away. The construction of the mill in 1936, and its enlargement in 1938, followed by the agreement between the two companies, whereby USV would mine and mill VCA's ore, to be converted into ferrovanadium in VCA's plants to supply VCA markets, is evidence of collusive cooperation between the two companies.

There was direct evidence to the effect that beginning in 1936, USV kept a very close surveillance on the activities of competitors and potential competitors on the Plateau. And, when in 1938, independent miners and millers began to spring up with the increase in market demand for ferrovanadium, USV immediately took steps to forestall competition.[3] USV commenced purchasing ore

[3]In an inter-company communication, dated September 14, 1938, from Van Fleet, Vice-president of USV in New York, to Burwell, Production Manager in Colorado, Van Fleet said:

"As I discussed with you the other night on the telephone, it has become very important that we find out accurately and definitely who is producing vanadium ore and where it is going. Along with this, we want to know the quality of the ore shipped so that we can get a line on the pounds of V_2O_5. I realize that some of the quality will have to be estimated, but we ought to get a very accurate line on what the shipments have been from southeastern Utah and southwestern Colorado. We may have to do something about this production, and if information could be obtained on what they get for this ore, it would help out. For instance—Harbison told me that he received 42¢ per pound for V_2O_5 and 60¢ for U_3O_8 on a low-grade Polar Mesa ore, but if the V_2O_5 went over 7% and the U_3O_8 over 2%, he received 45¢ per pound of V_2O_5 and 80¢ per pound for U_3O_8. These are pretty high prices for us, but it may be necessary to finally do something about it.

"I have an idea that this production of ore which is going to Europe and Japan is quite a quantity of V_2O_5, and more than we think it is. I have been talking about this for some time here in New York, stating that the high prices maintained for V_2O_5 in Europe invite and stimulate this kind of competition and can

from the independent miners in 1938, and in 1939 published its first ore price schedules, in which it quoted a base price of 2½¢ per pound for 2 percent ore, which was its estimated cost of producing its own ore. The evidence showed that USV inaugurated an aggressive policy of acquiring the mining claims of the independent miners who were unable to operate their properties at ore prices offered by USV, the only purchaser; that it acquired claims tributary to independent millers in order to dry up their source of supply; and that they purchased the output of independent millers while they had a surplus of oxide, in order to take it off of the market.[4]

With the continued increase in the demand for ferrovanadium, VCA decided to activate its plant at Naturita

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eventually support a considerable vanadium business, with possibly later on a plant. • • •

"I hope you will be able to put somebody on this and make a very careful canvass of the situation. If you could have a talk personally with Balsley you could probably find out all about it. In talking to Balsley it would be to his advantage to give you this information because I have an idea that he is not making any too much money out of this business, and it might be made easier for him on some kind of a combination with us if we decide to do something about it, rather than to fight it. We could, of course, run all this business out—but it would not be good policy to hint of this or threaten. • • •"

[4]In an inter-corporate communication between Van Fleet and his superior, Gormely, dated September 19, 1938, entitled "Competitive Vanadium Ore Production", Van Fleet reviewed the independent production on the Plateau, giving the names of the producers, the amounts produced and to whom sold, concluding as follows:

"We have already purchased two or three groups of claims which were potential producers and could be the nucleus of an operation. The intensive development during the past year has made it more imperative to continue this policy, and it now appears that we should purchase some properties and possibly install a small plant in southeastern Utah to forestall serious competition. A definite recommendation will be made on this as soon as the field work has been finished."

in 1939. When the plant opened in 1940, they commenced purchasing ore from independent miners, and there was evidence to the effect that VCA agreed with USV that it would pay the same price of 21¢ per pound for 2 percent ore. With the accelerated demand, there was some deviation from the base price in the way of bonuses and hauling differentials, but in the main, the parties pursued and policed the same price schedule.

In recognition of the necessity for increased domestic production of vanadium for the war effort, the United States government entered into a contract with USV on May 9, 1942, whereby USV was designated as its agent to construct and operate the Durango plant and to purchase vanadium-bearing ore suitable for treatment in the plant "at reasonable prices not to exceed 50¢ per pound of vanadium pentoxide (V_2O_5) delivered at suitable loading points." There was evidence that at about the same time, USV and VCA mutually agreed to raise the price of 2 percent vanadium ore purchased from independent miners to 31¢ per pound, and that they maintained this price schedule for ore purchased at both VCA's Naturita plant and USV's plant throughout the period complained of.

From this it is fair to infer, as did the jury, that some time prior to 1938, the appellants combined and conspired to monopolize or attempt to monopolize, and to restrain interstate trade in the vanadium industry; that they took affirmative and effective steps to fix the prices for the raw ore, fused oxide and ferrovanadium, and to forestall and eliminate competition and to divide the market between them.

THE MEASURE AND AMOUNT OF DAMAGES

The Balsley miners claimed and were permitted to recover damages based upon the difference between the price they were paid for the vanadium content of the ore sold to the appellants, and the prices they would have received but for the antitrust violations. They claimed damages based upon the value of the uranium content in the ore delivered to the appellants, and for which they were not paid. They presented their case by dividing their claims into four damage categories:

"(1) *Vanadium content of carnotite ore:* This category included:

a. All purchases of vanadium by appellants as private buyers from October, 1938 to June, 1958.

b. All purchases of vanadium by U.S.V. during a period in which they were commissioned by M.R.C. to acquire carnotite ore. This period ran from May, 1942, to February, 1944.

(2) *Uranium content of carnotite ore:* This category included:

a. All purchases of uranium by appellants as private buyers until the Atomic Energy Commission's ore buying program. The period ran from October, 1938 to April, 1948.

b. All purchases of uranium by U.S.V. during period commissioned by M.R.C. to acquire carnotite ore. This period ran from May, 1942 to February, 1944."

In their answer to interrogatories submitted in the form of the verdict for the unnamed plaintiffs in the class action, the jury specifically found that as to the vanadium

purchases by the defendants from the unnamed-miner plaintiffs for the period October 1938 through March 1948, the price per pound for 2 percent vanadium ore should have been 40¢, and 35¢ for the period from April 1948 through May 1958. As to purchases of 2 percent vanadium ore by USV as agent for MRC from June 1942 to February 1944, the jury found that the price should have been 50¢ per pound. With respect to uranium sales, the jury denied any recovery for the period January 1939 through December 1942. For the period January 1, 1943 to August 31, 1945, the jury found that the per pound price of uranium ore should have been $1.25, and $2.50 per pound for the period September 1, 1945 to March 31, 1948. The form of the verdict for the named plaintiffs did not specify the per pound price which the plaintiffs should have received for the periods set out and as specified in the verdict for the unnamed plaintiffs. However, the recovery as to each class, i.e., the named and unnamed, was based upon the same proof and necessarily computed according to the same formula. The amount of damages awarded each named plaintiff were computed on the basis of their individual ore settlement sheets, which, in each transaction, reflected the amount of ore delivered to the purchaser (USV or VCA), its vanadium content, and the price paid therefor, as against the price the jury found they would have received but for the violations. For the purpose of calculating the amount of uranium content of the ore sold during these periods, the jury justifiably found that the approximate average ratio of vanadium to uranium for the vanadium-uranium properties on the Colorada Plateau was six to one.

For the purpose of reviewing the factum and amount of damages awarded in the judgment, we shall conveniently observe the same periods and categories as did the jury in arriving at its verdict. But, we shall first consider the recoverability of damages for vanadium ore purchases while USV was acting as the agent for MRC (May 1942 to February 1944) in the prosecution of the government's ore-buying policies. The earnest contention is that the appellants could not have conspired to fix prices with respect to ore purchased by USV acting as agent for the government. As we have seen, the agency agreement between USV and MRC dated May 9, 1942, did make and constitute USV the agent of the government to construct a vanadium plant at Durango, Colorado, and commissioned USV to exert its best efforts to purchase for the account of the government vanadium ores for treatment at the government plants, at reasonable prices not to exceed 50¢ per pound, V_2O_5.

The trial court was requested to instruct the jury in substance that the government itself could not violate the antitrust laws; that an agent for the government, acting within the scope of his authority, was likewise immune, and that if the authorized activities of the agent were validly conferred, the fact that the agent may have had illegal private motives in the performance of his authorized duty was irrelevant. It is true, as appellants suggest, that the antitrust laws are inapplicable to government activities. And, it may also be taken as equally true that since the government acts only through its agents, such agents are likewise immune from liability under the statute while acting within the scope of his

authority in the furtherance of a declared governmental policy or legislative scheme. Parker v. Brown, 317 U.S. 341; Asheville Tobacco Board of Trade v. F.T.C., 263 F.2d 502. Cf. Atchison, Topeka & S. F. Ry. Co. v. Aircoach Transportation Assn., 253 F. 2d 877. But there is nothing in this agency contract to justify the inference that the government intended to transgress the antitrust laws. The contract does not purport to authorize USV to fix prices, restrain trade or achieve a monopoly in the vanadium industry, and we will not lightly infer an intention to do so. Cf. Milk Producers Assn. v. United States, 362 U.S. 458; United States v. R.C.A., 358 U.S. 334; United States v. Borden Co., 308 U.S. 188.

The court, correctly we think, instructed the jury that if the defendants used the agency powers "for the purpose of carrying out or assisting any combination or conspiracy to restrain trade or to monopolize trade in the vanadium industry or any actual monopolization thereof, the fact that they might have been government agents at the time does not immunize their conduct"; and that "a violation of the antitrust laws may be carried out by acts which, standing alone, may be legal, but if they form a part of an illegal combination or conspiracy to restrain or monopolize, then you may consider them with all of the other evidence in the case to arrive at your verdict." The court then proceeded to particularize to the effect that if, in the execution of the government ore-buying program, USV arrived at prices paid the miners as a result of agreement with VCA to pursue a plan to monopolize the vanadium industry, the fact that it was acting as agent for MRC would not immunize otherwise unlawful conduct.

"And this is so" said the court, "though government officials knew and tacitly approved the ore-purchasing programs which violated the antitrust laws."

Both the Durango plant and the Monticello plant were constructed with government funds to be operated by USV and VCA respectively for the account of the government in recognition of the urgent need for additional vanadium ore concentrates. The USV-MRC agency contract was designed to subsidize the mining of marginal ores for production in the government-owned and privately operated plants. USV was authorized to and did negotiate various prices for mined ore, depending upon its percentage content which bore upon the cost of mining and transportation. The evidence shows that many contracts were negotiated with miners on the Plateau, including those in the Balsley group, for the payment of varying prices, some below the 31¢ scheduled price, and some above. Of course, a negotiated price based upon grade, haulage and a 10 percent profit, is inconsistent with a conspiracy-fixed price, unless it can be said that the negotiated prices were in themselves designed to further the objectives of the combination and conspiracy. The appellees contend in effect that the negotiated prices were discriminatorily directed toward the effectuation of the monopoly.

It is difficult to determine from this record to what extent the negotiated prices were tainted by the subsisting conspiracy price of 31¢. Some basic facts are important guides in determining to what extent the found conspiracy permeated and influenced the MRC prices. First, there was positive evidence to the effect that contemporaneously

with the advent of the government ore-buying program and the USV-MRC contract of May 9, 1942, USV and VCA officials agreed to raise the base price of ore from 21¢ to 31¢ for 2 percent ore, and that throughout the period of the ore-purchasing agency, this basic price prevailed for private purchases of ore for USV and VCA privately owned plants at Naturita and Uravan, despite the accelerated demand for vanadium ore. USV's ore-purchasing officer became its principal ore-purchasing officer under the agency contract. And, it seems fair to say that he was at least in doubt concerning whether and to what extent the 31¢ privately established base price was to govern the government purchases. Indeed, it is difficult to discern whether he truly served the interest of the MRC ore-buying program, or whether he utilized his powers as a government agent to further the interest of the price-fixing and monopolistic design of an employer, USV. There was evidence to the effect that at least some of the plaintiff miners were unaware of USV's discretion to pay a reasonable price for the ore not to exceed 50¢ per pound.

One of the negotiated purchase contracts was between USV as agent for MRC and VCA, dated March 11, 1943, providing for the payment of 48¢ per pound, plus hauling allowance for 1.5 percent ore.[5] While all of this ore was milled in the government-owned-VCA-operated Monticello plant, at a loss to VCA, it was the highest price paid for ore on the Plateau under the MRC ore-purchasing pro-

[5]Under this contract, VCA sold and delivered to USV, as agents for MRC, 74,322 tons of 1.5% vanadium ore, or 2,229,000 pounds of vanadium V_2O_5, for which VCA received $1,333,725.00.

gram. Many of the contemporaneous contracts provided for much lower prices for the same percentage ore. The so-called negotiated prices paid under the USV MRC agency contract for ore to be processed in government-owned plants, were not intended to yield a profit to the millers. Indeed, the record shows that the Monticello and Durango mills were operated at a loss to the government. The prices were not open-market competitive prices, and ordinarily would not be a permissible element of damages based upon what was received and what would have been received but for the conspiracy. But even so, if, as the jury apparently believed, the prices paid to the independent miners in relation to the prices paid to VCA were discriminatory and intended to effectuate the monopolistic designs, the miners are entitled to recover the difference between the negotiated discriminatory prices and the price which the jury found the miners should have received but for the conspiracy, having in mind the relevant economic factors, including the negotiated price contemporaneously paid to VCA.

In the last analysis, it was for the jury to determine whether the negotiated price was actually a part and parcel of the appellants' design to achieve a monopoly, and whether the negotiated prices to the plaintiff-miners were discriminatorily different from those paid to VCA under the same circumstances. On the whole record, we cannot say that the jury's finding to the effect that the plaintiff miners should have been paid 50¢ per pound for 2 percent vanadium ore purchased by USV under its agency contract with MRC is without rational basis in fact and reason.

FACTUM AND AMOUNT OF DAMAGES FOR VCA-USV PRIVATE VANADIUM ORE PURCHASES FROM OCTOBER 1938 TO MARCH 1948

Appellants complain of the allowance of damages for ore sales during 1938 and 1939, on the grounds that since VCA did not commence purchasing ore on the Plateau prior to mid-1940, there could have been no price-fixing conspiracy, hence no evidence of controlled or predatory prices. But there was evidence from which the jury could reasonably infer that the 1938 and 1939 purchases of ore were made in pursuance of a monopolistic design; and that the prices paid to the independent miners were intended to effectuate and perpetuate the monopoly. The appellants were therefore liable for the difference between a competitive price and the monopolistic one.

The appellees concede the burden of proving (1) that the appellants violated the antitrust laws; (2) that the violations had an injurious impact on the plaintiffs; and (3) that there was sufficient economic data from which the jury could estimate or proximate the amount of damages.

The court clearly instructed the jury to the effect that plaintiffs had the burden of establishing by the greater weight of the evidence the alleged conspiracy to fix prices of uranium-vanadium bearing ore, and to monopolize or attempt to monopolize the vanadium industry; that such unlawful acts proximately caused injury to the property and business of the plaintiffs; that if they found by a greater weight of the evidence that the defendants did so conspire to fix prices and monopolize or attempt to monopolize, and that the plaintiffs were damaged thereby, they might resolve any uncertainty as to amount against the

wrongdoer and assess damages upon inferential, as well as direct and positive proof. In that respect, the jury was told that in making their estimates of damages to the plaintiffs, and particularly the price which they would have received but for the violations of the antitrust laws (determined by the jury to be 40¢ per pound for this period), they should consider all of the economic information produced at the trial, including the prices paid under the metal reserve program, and the price range authorized under the MRC-USV agency contract, the cost of production viewed in the light of the profits made, the prices received by VCA for ore it sold to USV as agent for MRC, and any reasonable allocation which the evidence permits of the defendants' profits as between ore, oxide and ferrovanadium.

The appellants complain of a myriad of errors in these instructions. First, they say that even conceding arguendo the existence of a conspiracy, there is no competent evidence to prove with the requisite degree of certainty that the plaintiffs suffered legal injury as a result thereof. Specifically, they deny that the uniform prices paid for the ore—21¢ to May 1942 and 31¢ thereafter—was not the fair market price of the ore. And, in that regard, they point to the fact that no other purchaser and miller of ore on the Colorado Plateau paid more than the so-called fixed prices. They call attention to the periods of soft markets and surpluses for ferrovanadium.

There is no direct evidence tending to show what vanadium ore would have sold for in a free market, absent the conspiracy. As we have seen, the MRC prices were not free market prices, and standing alone were not evidence

thereof. But, it is significant, we think, that during the period of war-time scarcity, when the government, through the MRC was subsidizing the production of vanadium ore through negotiated prices not to exceed 50¢ per pound V_2O_5, and was paying VCA 48¢ per pound for 1.5% ore, the fixed price of private purchases remained uniform and consistent at 31¢ per pound. In these circumstances, we think it not improper to allow the jury to consider the MRC prices in determining whether, absent the conspiracy, the plaintiff-miners would have received more. During all the period between 1938 and 1948, the defendants were the dominant purchasers and millers of vanadium ore on the Colorado Plateau. They were practically the only processors and sellers of ferrovanadium, the finished product. The jury found from competent evidence that the defendants fixed the price of the raw material which they purchased, and the price for which the finished product would sell, and that they controlled and divided the market between them.

While the mere existence of an unlawful conspiracy to fix the price of vanadium ore on the Colorado Plateau, purchased by the defendants from the plaintiffs, does not in and of itself prove legal injury to the sellers of the ore, i.e., that they would have received more for the ore, absent the conspiracy, at the same time, the prolonged existence of a price-fixing conspiracy in an integrated industry such as ours is proof of damages to those whose prices are directly affected thereby. In that respect, our case is noticeably akin to Mandeville Farms v. Sugar Co., 334 U. S. 219. And see also Fox West Coast Theatre Corp. v. Paradise Building Corp., 264 F.2d 602, where Judge

Fee said for the Ninth Circuit, "The mere unlawful combination over a period of time to eliminate competition is proof of damage"; and, in Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, the Ninth Circuit again said that applied restraint would patently result in some loss of business.

The appellants also attack that part of the instructions of the court which told the jury that in estimating damages, they could take into consideration the cost of production viewed in the light of the profits made as allocated between the raw ore, the oxide and the ferrovanadium. The court admitted evidence over the objection of the appellants, of their net profits from the sale of vanadium oxide and ferrovanadium. And, the jury was permitted to determine damages on the basis of the profit spread between the cost of the vanadium ore and the price of oxide and ferrovanadium.

Loss of profits has been accepted as constituting an element of recoverable damages where they are capable of being measured or estimated on a reasonable basis. See 20th Century Fox v. Brookside, 194 F.2d 846; Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F. 2d 950; Bigelow v. R.K.O., supra. It would seem reasonable to say that profits from sales of a finished product in a monopolistic market are distinctly relevant to the free market value of the raw materials, the cost of which was a constituent element of such profits. This is especially so when considered in the context of an integrated industry. It seems relevant to consider that from 1934 to 1947, ferrovanadium was sold in a controlled and restricted market for $2.70, $2.80 and $2.90 per pound, de-

pending on grade. And, there was some evidence to the effect that based upon the price paid for vanadium ore, and the cost of conversion into the finished product, the appellants could have profitably paid as much as 80¢ per pound for the V_2O_5 contained in the ore purchased from the plaintiff-miners. This data was based upon calculations which, while attacked, cannot be said to be wholly without factual basis. In these circumstances, we cannot say that the jury's finding to the effect that the free market price of 2 percent vanadium ore for the period October 1938 through March 1948 was 40¢ per pound instead of 31¢ was clearly erroneous.

DAMAGES FOR THE URANIUM CONTENT OF THE ORE

As we know, appellees claimed damages for uranium sales made to the appellants from 1938 to the advent of the Atomic Energy Commission in April 1948. The jury awarded no damages for sales made prior to January 1, 1943. The appellants first deny the existence of any conspiracy or monopolistic designs with respect to the purchases of uranium ore. The appellees take the position that the conspiracy alleged, and which the jury found, related to and affected the purchase of carnotite ore on the Colorado Plateau which, as we know, contained both uranium and vanadium on a ratio of about six parts vanadium to one part uranium; and that from the very beginning, appellants conspired not to pay the miners anything for the uranium content in the ore, while recognizing its value and while selling it to the government.

A bit of background is important to a consideration of our question. As we have seen, at the beginning of the mining operations on the Colorado Plateau, the uranium content of the carnotite ore was considered a valueless impurity, relegated to refuse in the form of tailings. The splitting of the atom in 1939, and the publication in 1940 of literature on the potential value of uranium as a fissionable material, fired the imagination of some scientists and industrialists, including some of the officers and employees of Union Carbide. As early as 1939, USV constructed a small recovery plant in connection with its Uravan operations. High grade uranium sludge was recovered from the tailings. About the same time, Union Carbide, through one of its subsidiaries, began experimenting with uranium as a source of energy, and in 1940, USV sold and delivered 1,000 pounds of uranium sludge to another subsidiary for experimental purposes. But, these experiments did not result in the production of uranium oxide for commercial purposes, and as far as we can determine from the record, no commercial use was made of it.

The so-called Manhattan District was formed in 1942 by the government for the specific purpose of secretly developing and producing the atomic bomb. In the latter part of 1942 or the first part of 1943, Manhattan entered into classified "cost-plus-a-fixed-fee" contracts with USV for the construction and operation of two "sludge plants", one at Uravan, Colorado, and another at Durango; and a refining plant at Grand Junction. The sludge plants were designed to manufacture uranium sludge or slime (designated by a secret code) from said tailings which had

accumulated from the operation of the vanadium mill at the same sites. The Grand Junction plant was designed to refine the sludge into uranium oxide, also designated by a secret code. Contemporaneously with these construction and operation contracts, the government contracted with USV to purchase the refined oxide from USV and the sludge from VCA. About the same time, the government-owned plant at Monticello was activated for the processing of uranium sludge under a contract between Manhattan and MRC.[6] About the same time, the government commissioned a subsidiary of Union Carbide called Union Mines, to develop processes for the beneficiation of uranium and to survey the resources of uranium on the Colorado Plateau, and make recommendations "for the acquisition of the strongest possible control of the products and disposal of such resources." Also in the early part of 1943, Manhattan enlarged VCA's Tandawanda ceramic plant, which had been used to process high grade uranium for the ceramics industry. Throughout the period of the so-called Manhattan project, this plant continued to be known as a ceramic plant for security reasons. All of these contracts contained the legally required provision against disclosure of any information relating to the contracted work under penalty of law. These contracts remained secret and classified until unclassified in 1957. None of these contracts contemplated a profit to the appellants for any of the work done or performed, or for

[6]As far as we can determine from the record, VCA had no facilities for the refining of the sludge to oxide, but sold the sludge to the government for processing and refining in government-owned plants at Tanawanda and Monticello, or at the USV plant at Grand Junction.

the products processed and delivered.[7] Most, if not all, of the high grade uranium sludge came from the workings of tailings which had accumulated from the vanadium operations, during which the uranium content in the ore was valueless. Notwithstanding all these activities, only 12½ percent of the uranium utilized in the Manhattan project came from the Colorado Plateau. Throughout the period of development of the atomic bomb, and until the dropping of the first bomb in 1945, Manhattan looked primarily to high grade uranium ores from the Belgian Congo for its source of fissionable material. The production of uranium on the Colorado Plateau was considered only as a by-product of the vanadium ore operations. There was no concentrated effort toward the exploitation of the uranium content in the carnotite ore until the advent of the Atomic Energy Commission in 1947.[8] Indeed,

[7]The first contract between the government and VCA dated November 1942 for the purchase of sludge, provided for the payment of 55¢ per pound for V_2O_5 and 75¢ for U_3O_8. Subsequent contracts in 1943 with amendments provided for the payment of 90¢ per pound for V_2O_5 and $1.10 for 30 percent U_3O_8. This price was later revised to $1.40, with the price of V_2O_5 remaining the same. Other contemporaneous contracts provided for the purchase of tailings from VCA at the Naturita plant for 25¢ per pound for contained U_3O_8 and 25¢ for V_2O_5. Similar contracts were entered into with USV.

[8]On December 7, 1948, Dr. Gustafson, Manager of raw materials operations of the AEC, issued a statement of policy in which he said in part: "Following the war it was tentatively decided by the Manhatfan District to purchase only by-product uranium rather than to stimulate and support increased production by special incentives. This position was based on the fact that the known uranium reserves of the Colorado Plateau were limited and expensive to mine and produce and that the only advantage of an accelerated program would be to make this limited supply available sooner. Since the estimated annual production of the Colorado Plateau, even under an accelerated pro-

appellees accuse the appellants of concertedly subordinating the production and marketing of the uranium content in the ore to the conspiratorial agreement to fix the price and control the market of vanadium products.

With the dropping of the bomb and the ending of the war in 1945, the demand for uranium as fissionable material began to phase out. Having developed the bomb which ended the war, the mission of the Manhattan District was accomplished. While the government apparently continued to honor its existing uranium contracts with appellants after 1945, there was no urgent need or market for uranium. Matters drifted along u. 'il Manhattan went out of existence at the end of 1946 and the Atomic Energy Commission took over in January 1947. There has never been a free market for U_3O_8 as fissionable material. The government is and always has been the sole and only purchaser at prices fixed or negotiated with the suppliers.

Viewed in this perspective, it seems doubtful whether the pre-existing vanadium monopoly was broad enough to embrace an agreement not to pay the plaintiff-miners for the uranium content of the carnotite ore purchased by the appellants during the period in which the govern-

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gram, would be small in relation to total U. S. requirements and to supplies available from foreign sources, it appeared more economical to obtain the uranium as a by-product from vanadium operations which were geared to the vanadium market. • • • The decision to undertake a rather extensive development and production program on the Colorado Plateau was based on a number of considerations: the use and conservation of idle facilities; the conversion of underground ore reserves into immediately available finished product; and, as part of our over-all uranium program, the development of a domestic uranium mining industry adequately staffed with experienced technical and management personnel, which could be rapidly expanded in time of an emergency."

ment was purchasing uranium sludge processed from accumulated tailings at the vanadium mill sites. We will, however, resolve all doubts in favor of the findings which are implicit in the jury verdict, and assume the existence of a conspiracy to monopolize or attempt to monopolize the market for the uranium content of the carnotite ore, which is the subject matter of this suit. But even so, we are unable to discern how the appellees can be said to have suffered any compensable harm as a result of the activities of the appellants in connection with either the MRC vanadium ore-purchasing program, or the Manhattan-uranium project. The USV-MRC contract of May 9, 1942, authorizing USV to purchase ore suitable for treatment in government-owned plants at reasonable prices not to exceed 50¢ per pound for vanadium oxide, did not authorize USV to pay anything for the uranium content of the ore. Indeed, there is nothing in the record to indicate that the government's vanadium ore-buying program contemplated the payment for or the recovery of the uranium content of the ore purchased under the USV-MRC contracts.[9] With the advent of the uranium-purchasing program in 1943, the appellants, and for that matter everyone else, was forbidden under penalty of law

[9] In November 1942, the Vice President and General Manager of MRC purchasing program wrote to a miner as follows: "Since the uranium content of these ores is not recovered, at the present time, in the plants in operation for Metals Reserve Company's account, no payment is made for uranium content."

The record shows that in 1943, the Manhattan District contracted with MRC to process and deliver uranium sludge from tailings at the government-owned Monticello plant at the same prices being paid to the appellees under similar contracts. But, there is nothing in the record to indicate that as operator of the plant, VCA in any wise profited by this operation.

to acknowledge that the uranium content in the ore was being saved or utilized. It is agreed that the Manhattan project for the acquisition of uranium ore on the Colorado Plateau was a security secret. It may well be that a portion of the vanadium content of the miners' ore found its way into the sludge which the appellants sold to Manhattan under the contracts, but even so, the contracts did not contemplate a profit to the appellants, and the record shows that operating profit, if any, was negligible.

In these circumstances, we can find no factual basis for the award of damages based upon ore purchases prior to the dropping of the atomic bomb in July 1945. But appellees assert that there was no reason for secrecy after July 1945, and therefore no valid grounds for not compensating the appellees for the uranium content of ore purchases after that date. Subsequent to the dropping of the bomb, and in 1946 and 1947, the government entered into contracts with the appellants for the purchase of U_3O_8 in the form of sludge and sodium uranate, highly refined uranium products. While these contracts were coded and classified, they explicitly provided for the payment of the U_3O_8 contained in the ore, "whether such ore is produced or mined by the contractor or purchased from an outside source." These contracts as revised and amended, are irrefutable evidence of the amount of uranium contracted to be sold to the government during the years 1945, 1946 and 1947, and the unit price to be paid therefor.[10] In January 1946, USV issued a price schedule

[10]In 1945, USV sold to the government uranium oxide with a value of $216,116.00, at an average unit sales price of $.324; in 1946 it sold uranium oxide to the government with a value of $2,174.00 at an average unit sales price of $.300; in 1947 it sold

providing for the payment for uranium at 30¢ for .75 percent uranium ore. VCA issued its first price schedule in the spring of 1947 for 50¢ per pound for similar ore.

Giving full effect to the combination and conspiracy as it embraced the uranium content of the ore purchases, we are brought to the point of confining the compensable damages to purchases of the U_3O_8 content of the carnotite ore which are traceable to the U_3O_8 contracted sales to the government in 1946 and 1947, based upon the per unit price of such sales.[11]

This brings us to the matter of attributable damages for private vanadium ore purchases by the appellants from the appellees subsequent to April 1, 1948. Again we can find no rational basis for finding that the plaintiffs suffered any damages resulting from the existence of a conspiracy during that period. In that connection, we may assume that the conscious parallelism in the pricing and marketing structure of the vanadium industry, as shown

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the government yellow cake containing uranium in the value of $734,370.00 at an average unit sales price of $9.000.

In 1945, VCA sold the government uranium sludge with a total value of $176,208.00 at an average per unit sales price of approximately $1.50; in 1946 it sold $61,175.00 worth of uranium sludge for about the same unit price; in 1947 it sold sodium uranate to the government for the gross price of $254,170.00, at $4.705 per unit.

[11]The record does not clearly indicate the method or formula employed by the jury to identify and calculate the miners' share of the tailings from which uranium sludge was processed and sold to the government during the Manhattan project. Neither the briefs nor the record enlighten us on this point beyond the statement that the damages awarded to the individual miners are based upon their respective vanadium ore settlement sheets and determinable on the ratio of one part uranium to six parts vanadium; and that 10 percent of the ore milled at Uravan by USV was purchased ore, and 30 percent of the ore milled by VCA at Naturita was purchased ore.

by the record, was sufficient to sustain the burden of proving the continued existence of the combination and conspiracy beyond the advent of the Atomic Energy Commission. See Morton Salt Co. v. United States, 235 F.2d 573.

It is important to remember that there was a surplus of vanadium in 1944 when the government discontinued its MRC ore-buying program, and that when in 1947, uranium became the prize element in the carnotite ore and the government entered into contracts with the appellants for the purchase of sludge and other high grade uranium products, it became necessary to make arrangements for the disposition of the vanadium content. This resulted in the purchase and stockpiling of vanadium on an established ratio. The mounting surplus of vanadium from the urgent quest for uranium, and the apparent necessity for keeping it off the market, led the Atomic Energy Commission in April 1948 to promulgate minimum established prices for uranium-bearing carnotite or roscoelite ore. Atomic Energy Commission Circular 3, which fixed the price of uranium, also fixed the minimum price of vanadium at 31¢ per pound, not exceeding 10 pounds of V_2O_5 for each pound of U_3O_8. Twenty-three different companies on the Colorado Plateau became engaged in the operation of uranium processing plants, most of which were larger than the appellants' two plants. None of these companies paid more than the established minimum price for vanadium, and in turn sold the same to the A.E.C., which stockpiled it and unsuccessfully offered to sell it below the prevailing price. Although appellants continued to control the ferrovanadium market and to fix the prices, it

was utterly impossible for them to have controlled or fixed the price of vanadium ore. The government price was a support price. Several processors refused to pay for the vanadium at all. We are thus brought to the conclusion that the judgment of the trial court based upon ore purchases subsequent to April 11, 1948 is factually unsupportable.

CLAIMED ERRORS IN THE INSTRUCTIONS

The appellants complain of the refusal of the court to instruct the jury on the "relevant market", "thrust upon monopoly", "refusals to deal", and instructions on price uniformity and attempts to monopolize. They particularly complain of the court's refusal to give nineteen requested instructions after indicating its intention to do so. Appellees claim that the appellants failed to properly save their objections to the court's instructions in accordance with Rule 51 F.R.C.P. But the appellants submitted more than fifty requested instructions, many of them revised requested instructions, and all intended to present to the court appellants' theory on the various crucial points in the lawsuit. They objected to the refusal of the court to instruct the jury as requested in a manner to bring to the attention of the court the various objections and the grounds therefor. The court was fully informed of the appellants' theory of the case and the requirements of the Rule were fulfilled. See Downie v. Powers, 193 F.2d 760; cf. Western Machinery Co. v. Consolidated Uranium Mines, 247 F.2d 685; Hayes v. United States, 238 F.2d 685; Pridgin, et al v. Wilkinson, et al. (10 CA-Sept. 1961) ____F.2d____.

Particularly, the appellants requested the court to instruct the jury that in determining whether the appellants attempted to exercise or did in fact exercise unlawful monopoly powers, they must take into consideration the relevant market for the products involved; that relevant market was composed of products with reasonable interchangeability for the purpose for which they were produced—"price, use and quantities considered:" and that if the jury found that vanadium oxide and ferrovanadium had no independent market, but were interchangeably used in connection with or in competition with other ferro alloys, they could not find that the appellants agreed to monopolize, or either of them monopolized or attempted to monopolize in violation of the antitrust laws. In support of this requested instruction, reference is made to United States v. du Pont Nemours & Co., 351 U.S. 377. See also International Boxing Club v. United States, 358 U.S. 243; United States v. Yellow Cab Co., 332 U.S. 218; Cole v. Hughes Tool Co., 215 F.2d 924.

There was some evidence that ferrovanadium was sold in the ferro alloy market in competition with other alloys. And, commodities which are "reasonably interchangeable by consumers for the same purposes make up that part of trade or commerce, monopolization of which may be illegal." See du Pont, p. 395, quoted in International Boxing Club. But, Section 1 of the Sherman Act condemns unreasonable restraints irrespective of the amount of trade or commerce involved; and Section 2 condemns a monopoly or attempts to monopolize—either in concert or individually—"any part of trade or commerce." See

United States v. Paramount Pictures, 334 U.S. 131, also quoted in International Boxing Club. We do not understand the du Pont case to hold that every commodity which is reasonably interchangeable with another commodity cannot be the subject of a Section 2 illegal monopolization, for, "industrial activities cannot be confined to trim categories. Illegal monopolies under Section 2 may well exist over limited products in narrow fields where competition is limited." du Pont, p. 395. In our case, the mining, processing and marketing of the finished products from vanadium ore were undoubtedly an integrated industry forming a definitive part of trade and commerce, and it was undoubtedly the subject of monopolization without relationship to other competitive products. Moreover, the gist of the claim here is not the monopolization of the finished product, ferrovanadium, but rather of the raw materials from which it is made. The mining and marketing of the raw materials were undoubtedly an "appreciable part of interstate commerce" and as such subject to a Section 2 monopolization. United States v. Yellow Cab Co., supra.

Nor do we agree that the trial court erroneously refused to instruct on the theory of "thrust upon" monopoly. There is nothing here to indicate or from which it can be fairly inferred that the found monopoly in vanadium was "thrust upon" the appellants or either of them by the "forces of nature" or industrialized attrition. See Swift & Co. v. United States, 196 U.S. 375, 396, quoted in United States v. Griffith, 334 U.S. 100, 105. And see also United States v. Aluminum Co. of America, 148 F.2d 416.

On the issue of monopoly and attempts to monopolize, the trial court instructed the jury in substance that it was unreasonable per se to foreclose competitors from any substantial market; that the use of a monopoly power, however lawfully acquired, to foreclose competition, obtain a competitive advantage, or to destroy a competitor, is unlawful under Section 2. And see United States v. Griffith, supra, p. 107. The court was careful to draw a distinction between a conspiracy to monopolize under Section 1 and a monopolization or attempts to monopolize under Section 2. It defined a Section 2 monopoly as "the attainment of such position of [market] power in an industry so as to be able to exclude others from competition or fix prices." And, it went on to tell the jury that upon the attainment of such market power by a single corporation, coupled with showing of employment of methods, means and practices, which are in themselves in restraint of trade, constitute a violation of Section 2. And see American Tobacco Co. v. United States, 328 U.S. 781, 785; Kansas City Star v. United States, 240 F.2d 643. And, the court went on to say that Section 2 condemns attempts to monopolize if accompanied by a specific intent to exclude others from competition or to fix prices.

The appellants complain of the refusal of the court to tell the jury that the specific intent must be accompanied by conduct sufficient to create "a dangerous probability of monopolization." The trial court instructed the jury to the effect that before they could find for the plaintiffs, they must be satisfied by the greater weight of the evidence that the defendants agreed to restrain trade in vanadium products, or that they monopolized or attempted

to monopolize, either in concert or individually; and that such unlawful conduct had an injurious impact on the plaintiffs' businesses. We think the instructions in that regard correctly stated the law of the case, and we do not think it was reversibly erroneous to refuse to further define "attempt to monopolize" beyond the point of telling the jury that the attempt must be accompanied by a specific intent to acquire market power and exclude others from competition. Having thus correctly instructed the jury, appellants cannot complain of the refusal of the court to give their requested instructions, even though they may have been literally correct statements. See Loew's, Inc., v. Cinema Amusements, 210 F.2d 86; Tyler v. Dowell, Inc., 274 F.2d 890; Telluride Power Co. v. Williams, 164 F.2d 685.

The appellants complain generally of the instructions as being weighted in favor of the appellees and against the appellants. They earnestly contend that rulings in the course of the trial, together with his instructions, so influenced the jury so as to deprive them of a fair trial. There are, to be sure, instances in the record in which the trial court indicated with some emphasis his view of the evidence, and even a critical attitude toward counsel for appellants. And, it may be fairly said from the tenor of the whole record that the jury was impressed with the views of the court concerning the merit of the plaintiffs' case, and the demerits of the defendants' case. But, as we have recently said, "a judge presiding over a federal court is not a mere umpire. He has both the responsibility of assuring the proper conduct of the trial and the power to bring out the facts in the case." Jordan v.

United States (10 CA ..... Sep ..961) ..... F.2d ..... To that end, an expression of the court's views with respect to the evidence and conduct of counsel within proper limits is permissible, provided the jury is given to understand that they are free to form their own opinion of the facts and apply them to the law. See Tyler v. Dowell, Inc., supra. At the beginning and ending of the court's instructions, the jury was told that they were the sole judges of the facts and of the credibility of witnesses having testified to facts, and that it was for them to determine who they would believe and where the ultimate truth lies; and that if, in the course of the trial or during the instructions, the court had said anything indicating its view of the testimony, and the jury entertained a different view, they should follow their own opinion rather than the court's. The jury was emphatically told that it was for them to resolve all conflicts in the evidence, and that they should consider the evidence as a whole "carefully, impartially, without any bias or prejudice of any kind, way, shape, manner or form, one way or the other." In these circumstances, we do not think the trial court exceeded the limits of his prerogatives as the governor of the trial.

The appellants also complain of the admission and exclusion of evidence. But we do not think the court's rulings in that regard prejudicially affected the outcome of the litigation. See Rule 61 F.R.Civ.P.; Blum v. Cotrell, 276 F.2d 689.

The appellants complain of the inclusion, as a part of the costs awarded to the plaintiffs, the sum of $9,915.63 for accounting fees for services performed by an accounting firm for the plaintiffs in connection with the prosecu-

tion of the case. These fees are not properly allowable. See Euler v. Waller, etc., (10 CA—Sept. 1961) ..... F.2d ....., construing Rule 54(d) F.R.Civ.P.

The appellants also complain of the allowance of $500,000.00 attorney fees as erroneously excessive. Inasmuch as in our view the trial court's judgments must be vacated and modified, we have given consideration to the allowance of attorney fees in the light of the outcome of the litigation here, commensurate with the judgments to be entered. We are of the considered opinion that an allowance of 15 percent of the amount recovered, together with the allowable costs, would be reasonable.

The several judgments are vacated and the cases remanded for the entry of judgments in favor of the respective appellees: (1) for the difference between the amounts paid and 40¢ per pound V_2O_5 for the vanadium content of the private ore purchases by the appellants from the appellees from 1938 to 1948; (2) for separate judgments in favor of the appellees for the difference between the prices paid to the appellees and 50¢ per pound V_2O_5 for ore purchases by USV as agent for MRC; and (3) separate judgments in favor of the appellees for the value of the uranium content of ore purchases from them, which is identifiable in the uranium sales in any form by the appellants to the government subsequent to September 1, 1945, based upon unit prices received by the appellants from the government, in accordance with the several contracts of record.

COUNT TWO OF THE BALSLEY CASE

As we have seen, the jury returned separate verdicts in this case—one in favor of the thirty-six plaintiffs named in the first count, and another for the class of approximately three hundred fifty unnamed plaintiffs. The latter verdict was in response to special interrogatories, which submitted to the jury (1) the question whether defendants violated the antitrust laws; (2) whether such violations resulted in damage to the members of the class; and (3) the amount of per-pound damages which the respective members of the class would have received for their ore, during the specified period, but for the violations.[12]

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[12]The form of verdict submitted to the jury by the court and the per-pound damages found by the jury in the bracketed portions, is as follows:

"We, the Jury Impaneled in the Above Entitled Action, Find That:

1. The defendants did violate the antitrust laws.
2. The violations did have an injurious impact on that class of persons identified as those who mined and sold, either as lessors or lessees, vanadium-uranium ore to the defendants on the Colorado Plateau.
3. But for the violations of the antitrust laws this class would have received the following amounts per pound to cover the vanadium and uranium content of the vanadium-uranium ore based on 2% V_2O_5.

VANADIUM

(a) For the period October 10, 1938 to March 1948 — $[.40] per pound.
(b) For the period April 1, 1948 to May 28, 1958 — $[.35] per pound.
(c) For the period June 1, 1942 to February 1944, as to sales to United States Vanadium as Agent for Metals Reserve Corporation (MRC) — $[.50] per pound.

URANIUM

(a) For the period January 1, 1939 to December 31, 1942 — $[none] per pound.
(b) For the period January 1, 1943 to August 31, 1945 — $[1.25] per pound.

Pursuant to the verdict, the court entered an order giving the unnamed miners six months to appear and file claims before a special master who will determine the extent, if any, of each miner's damages, in accordance with the per-pound formulae provided in the verdict. The court also ordered the defendants to produce their ore settlement sheets identifying the members of the class and the amount of ore purchased from each. The final judgments, as to each member of the class, are to be based upon the prescribed per-pound formulae and in accordance with the respective ore settlement sheets.

It is appellants' contention that the procedure adopted by the trial court erroneously authorizes intervention by the unnamed plaintiffs after rendition of a favorable verdict. And we are thus squarely brought to an unresolved question of procedural law, i.e., whether in a class action under Rule 23(a)(3), F.R.Civ.P., non-participating plaintiffs may intervene after determination of defendants' liability, to share in the fruits of a judgment obtained by their participating representatives.

One line of authority is to the effect that a 23(a)(3) class action is merely another joinder device, placed in the Federal Rules in order to obviate the jurisdictional requirements of complete diversity "where there are numerous persons who have claims or defenses that involve a common question of law or fact." 3 Moore §23.10(3), p. 3448. See e.g. Kainz v. Anheuser-Busch, Inc., 194 F.2d

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(c) For the period September 1, 1945 to March 31, 1948 $[2.50] per pound.

4. The approximate average ratio of vanadium to uranium for vanadium-uranium properties on the Colorado Plateau is [6] to 1."

737, 743; Central Mexico Light & Power Co. v. Munch, 116 F.2d 85; Independence Shares Corp. v. Deckert, 108 F.2d 51, 55; California Apparel Creators v. Wieder, 162 F.2d 893; 3 Moore §23.10; 2 Barron & Holtzoff §§562, 569. From this it has been reasoned that 23(a)(3) serves only this one purpose and, consequently, only those persons who are actually parties to the litigation are bound by or can share in a money judgment.[13] See e.g., Weeks v. Bareco Oil Co., 125 F.2d 84, 91; Oppenheimer v. Young & Co., 144 F.2d 387; 3 Moore §23.11(3); 2 Barron & Holtzoff §572; and that any other use of the rule would violate the precepts of mutuality of estoppel which may have constitutional overtones. I.e. see Hansberry v. Lee, 311 U.S. 32, 43; 3 Moore §23.11(5).

Other courts, in cases where there has been an identifiable class, have allowed unnamed plaintiffs to intervene and share in the judgment obtained by their representatives, insofar as each is able to prove both membership in the class and damages. See York v. Guaranty Trust Co., 143 F.2d 503, 529, reversed on other grounds, 326 U.S. 99; Pentland v. Dravo Corp., 152 F.2d 851, 856; Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331, 336; Nagler v. Admiral Corp., 248 F.2d 319, 327; All American Air-

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[13]It is interesting to note that Professor James W. Moore, a distinguished member of the original Rules Committee, apparently proposed that the Committee adopt a provision to the effect that a judgment in a 23(a)(3) class action be "• • • conclusive upon only the parties and privies to the proceedings." The Committee did not accept this proposition and it seems to have formed the basis for Professor Moore's reasoning in his monumental treatise, which has had an obvious influence upon the courts. See 6 Stanford Law Review 120, 137-141, and the authorities cited. Also see Moore & Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment, 32 Ill. Law Rev. 555, 563; 3 Moore p. 3472.

ways v. Elderd, 209 F.2d 247; Speed v. Transamerica Corp., 100 F.Supp. 461, 463; Tolliver v. Cudahy Packing Co., 39 F.Supp. 337, 339; Alabama Independent Service Station Assn. v. Shell Petr. Corp., 28 F.Supp. 1, 155; Hormel v. United States, 17 F.R.D. 303; State Wholesale Grocers v. Great A & P Tea Co., 24 F.R.D. 510, 512-513. See also Kalven & Rosenfield, the Contemporary Function of the Class Suit, 8 U.Chi. L.Rev. 634; Comment, The Spurious Class Suit; Procedural and Practical Problems Confronting Court and Counsel, 53 NW. U.L.Rev., 627, 630-633; Keeffe, Levy & Donovan, Lee Defeats Ben Hur, 33 Corn.L.Q. 327; Comment, 46 Col.L.Rev. 818.

Undoubtedly this latter solution results in the more expeditious and efficient disposition of litigation and ought therefore to be favored. If, on the other hand, this type of class action was intended to have as its only function an adjunctive method of permissive joinder, there would be no logical reason for its being made a part of Rule 23 instead of another means of joinder under Rule 20. It is of no avail to say that 23(a)(3) is merely meant to obviate the requirements of complete diversity and thereby allow joinder by non-diverse parties in cases where there are numerous members of the class. See 3 Moore §23.10 (3), p. 3448. It is, of course, true that the Rule does serve this function; however, we envisage it as having a broader purpose—to allow a final determination of common questions of law and fact. Otherwise 23(a)(3) is relegated to an out-of-context incongruity amongst the utilitarian procedural modes which, when brought together, elucidate the modern-day concepts of class actions. We would thus be brought to the point of saying, "* * * that where it is

impracticable to bring all the parties before the court they must nevertheless be brought before the court." Kalven & Rosenfield, supra, p. 700. This result would be manifestly inconsistent with the broad purposes of the Rules.

It is likewise sophistic to argue that mutuality of estoppel operates to prevent the unnamed miners from intervening after rendition of the verdict. For one is not precluded from claiming the benefits of a favorable judgment to which he was not a named party, simply because he would not have been bound by an unfavorable judgment rendered against named parties who did not adequately represent his interests. Hansberry v. Lee, supra, p. 43. But, even so, whether these plaintiffs would have been bound by an unfavorable judgment is not decisive. The critical fact is that the court has yet to enter the final judgments, and mutuality of estoppel is therefore inapposite. Before any final judgment is rendered, all unnamed claimants will be present and required to prove their identity with the class who were damaged by force of defendants' unlawful acts. Defendants' liability and the extent thereof has been competently proven by the named plaintiffs and it would be grossly redundant to say that it must be proven again by the unnamed members of the represented class. See 71 Harv. Law Rev. 934-939.

Nor does submission to a special master violate defendants' right to a single, indivisible jury trial. All operative facts have been determined in the original action. The master serves only to assess the amount of individual damages, based upon the formulae stated in the verdict and appellants' own records. And see Rule 49(a) F.R.

Civ. P. If, in the process of identifying the members of the class and assessing the amount of their respective damages, unresolved questions of fact are disclosed, it is time enough to submit those questions to a jury, duly empaneled for that purpose. The interlocutory order of the court does not contemplate the denial of the right to a jury trial on any unlitigated question of liability.

The defendants make the further argument that the statute of limitations has run as to those miners who were not parties actually before the court. In order to reach this conclusion, they contend that the filing of the original action serves to toll the statute only in favor of those present and that each class member must "appear and assert his claim" before expiration of the statutory period. See also Athas v. Day, 161 F.Supp. 916; 3 Moore §23.10, p. 3443. If, however, the unnamed plaintiffs are to be accorded the benefits of the judgment, it must be said that the running of the statute of limitations is tolled by the commencement of the suit. See also Joint Council v. Delaware L. & W. R. Co., 157 F.2d 417, 421; Lynch v. American Motorists, 101 F.Supp. 946; 3 Moore § 23.12, p. 3476. If a class action is maintainable as such, it is incongruous to say that the absent members, who are represented by those present, may not rely upon the commencement of the action by their brethren to toll the running of the statute. This would only serve to "convert the rule into a trap" for those who have expeditiously allowed their rights to be maintained by a class action. York v. Guaranty Trust Co., supra. See also Richmond v. Irons, 121 U.S. 27, 52-53; Deckert v. Independence Shares Corp., 39 F.Supp. 592.

The appellants' final contentions in this action attack the questions propounded by the form of verdict and the propriety of the court's order. Suffice it to say that the action was ripe for submission on special interrogatories, and the questions posed by the court cannot be deemed "clearly erroneous" or a breach of discretion. The attacked order merely contemplates the submission of a plan for consideration by the court. Until this plan has become a part of a judgment or other final order, any question concerning it is academic. Of course any orders of submission and judgments rendered must be in conformity with the judgments to be entered for the named plaintiffs, in accordance with the views herein expressed.

No. 6319

Union Carbide and Carbon Corporation and
Vanadium Corporation of America

vs.

Frank Nisley, Jr., et al

As indicated in the forepart of the Balsley opinion, supra, this appeal is from a judgment against the same appellants in favor of ore mill men on the Colorado Plateau, who claimed to have suffered the loss of their ore milling business as the result of the monopolistic activities described in the Balsley case. We start with a factually established combination and conspiracy to monopolize the source, fix the price, and control the market for vanadium ore and its products, as in Balsley. Our inquiry then is confined to the sufficiency of the evidence to support a jury finding that the appellees, Nisley and Wilson, were damaged in their business by the appellants' predatory practices, and if so, whether to the extent of the jury's verdict, i.e., $40,000.00 tripled to the sum of $120,000.00. We must bear in mind that it was incumbent upon the appellees to prove that they suffered damages as a proximate result of the conspiracy or monopoly with reasonable certainty. But, having thus established the factum of damages, the amount thereof may be fairly approximated by the jury. See Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950; Telluride Power Co. v. Williams, 164 F.2d 686. And, we must also remember that the jury, not the court, is the trier of the facts in these cases, and if the evidence, viewed in its most favorable light, justifies the crucial inferences the jury has

drawn from those facts, we are not to disturb them even though as a fact finder we would have drawn a different inference or conclusion. See Atlas Building Products Co. v. Diamond Block & Gravel Co., supra, and cases cited. Some contextual facts are necessary to an understanding of our precise problem.

With the up-turn of the market for vanadium products in 1938 and 1939, due to defense requirements, several small oxide ore mills began operation on the Plateau. One of them was the Gateway Alloys Mill, located at the foot of a mountain containing rich deposits of carnotite ore. The ore claims belonged to another party, but were leased or let to Gateway for so many "cents per pound for vanadium mined." The mill commenced operations in 1938, but due to mismanagement or uneconomical operations, was closed in 1940. About the same time the manager for Gateway made arrangements with USV to take over the operation of the mines. During the next year, USV constructed a road on the other side of the mountain from the Gateway plant, stripped 12,000 or 15,000 pounds of surface ore from the claims, and hauled it about 65 miles to its plant at Uravan. On July 1, 1941, USV turned the leases back to Gateway Alloys, Inc.

Meanwhile, and in March 1941, appellees Nisley and Wilson formed a partnership to reopen and operate the Gateway mill under a lease from the original owner. Operations commenced in June 1941 on a ten-ton per day ore schedule. The mill was capable of producing only an intermediate product called "red cake", the first shipment of which was sold to USV. A dispute arose concerning the assay, and no further sales were made. The

mill was closed until an arrangement was made with the Continental Ore Company to purchase the mill's entire oxide output for $1.03 per pound, f.o.b. Grand Junction. The price was later raised to $1.15 per pound. Modifications were effected to enable the mill to process black vanadium oxide, all of which was delivered by directions of Continental to the Apex Mining Company in Chicago for processing into ferrovanadium.[14] Apparently Apex's ferrovanadium operations were not profitable or satisfactory. In any event, in the early part of 1942, Apex approached VCA, offering to sell its ore stock and equipment to VCA. The transaction was eventually consummated and Apex went out of the ferrovanadium business. Nisley-Wilson thereupon lost its oxide customer and appellants lost a ferrovanadium competitor. About the same time and in May 1942, MRC commenced its ore-buying program through USV. The base price of vanadium ore was raised from 21¢ to 31¢; Nisley-Wilson was unable to compete and mill operations were discontinued. In October 1942, Nisley and Wilson negotiated a contract with the War Production Board to process ore supplied to them by USV as agent for MRC for a stipulated price per oxide pound. While this Toll Agreement was reached in October 1942, operations did not commence until April 1943. By this time it was necessary for the partnership to negotiate a loan to install new equipment and enlarge their facilities. The mill operated under the Toll Agreement from April 1943 until January 1944, when the agreement was terminated by MRC. By this time the war-time

[14]For more detailed facts concerning this arrangement, see Continental Ore Co. v. Union Carbide and Carbon Corp., 289 F.2d 86, cert. granted, ___ U.S. ___.

demand for vanadium had been satisfied, and as we have seen from Balsley, there was a surplus of vanadium. The mill was closed with a six-months stockpile of ore, which was later moved to the USV plant at Uravan. Production at the Gateway mill was never resumed, and the venture failed.

The precise claim is to the effect that from the very outset, the appellants conspired and combined to monopolize all ore claims capable of supporting competitive mills and thus made it unprofitable for any independent mill to operate on the Plateau; that they combined to foreclose the appellees from a market for their oxide; that USV, as agent for MRC, deliberately and designedly delayed and forestalled the consummation of the Toll Agreement and the commencement of operations under it until the appellees were in dire circumstances, and then precipitously terminated the contract in order to prevent them from getting a foothold in the vanadium business. The further contention is that, after the termination of the Toll Agreement, the appellees were excluded from the uranium business, all of which resulted in complete loss of the business enterprise, with consequent loss of profits during the period of operation and prospective profits, but for the failure.

In our view of the evidence, the jury might very well have concluded that the failure of the venture was due to under-financing, mismanagement or uneconomical operation, all factors over which neither the appellants nor either of them exercised any conscious control. But there was evidence which the jury apparently credited, to the effect that the appellants set out to acquire all of the

vanadium ore claims on the Colorado Plateau which were capable of supporting an independent milling venture, i.e., to discourage the independent millers "in any way we could." There was evidence to the effect that USV stripped the cheap ore from the mines tributary to the Gateway mill and hauled it out 65 miles over a road away from the mill, not because they needed the ore, but because USV "wanted to keep another vanadium operation from getting started." They offered the millers 65¢ per pound for oxide when the going rate was $1.10.[15] This stripping operation occurred before Nisley-Wilson took over the mill in June 1941, but this conduct was indica-

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[15] Mr. Burwell, responsible USV official on the Plateau, testified as follows:

"A. Well, I followed out instructions.

Q. What were the instructions with respect to this little mine, a rather valuable mine that was owned by the independent?

A. Well, to discourage them in any way we could. They offered the vanadium oxide to us for sale. I offered them 65¢ a pound for the oxide. We couldn't offer them any more. We didn't encourage them to produce any vanadium. We discouraged them.

Q. Did you ever get your hands on that claim?

A. Oh, yes.

Q. How did that happen?

A. We made an arrangement with the Molybdenum Corporation of America to sublease under Brown the claims that are in the cliffs and mountains around the Gateway Alloy plant. The Gateway Alloy plant was down in a canyon, and these mines are about 1,500 to 2,000 feet above it. The roads and trails went up. Took a lease on these claims, sublease, and paid the balance of the royalties into the Molybdenum Corporation, and on-the-ground deal and an overriding royalty to Harry Brown, and I think we moved out 12,000 to 15,000 pounds of easily accessible cheap ore from there to Uravan, a haul of about 65 miles. We constructed a road up there and we cleaned out their accessible ore deposits.

Q. Wasn't that more expensive than the ore you could have mined from your own properties?

A. Yes, that ore cost us more than the ore we had immediately available at our own plant, because our own plant was located right here and our mines were within 10 miles of

tive of a plan to exclude the appellees from the business of manufacturing vanadium oxide on the Colorado Plateau. It is significant that during this period, when vanadium was in short supply and VCA was purchasing a large part of its requirements from USV, Nisley-Wilson was unable to market its products to either USV or VCA.

The evidence strongly indicated that Apex went out of the ferrovanadium business because a fire destroyed a part of its equipment, and because the operations were unprofitable, due in part to its unsatisfactory relationship with Continental. It is undisputed that Apex approached VCA to sell its equipment and stockpile, but it is also inferable that VCA's interest in the Apex equipment and stockpile was generated by the plan to discourage independent milling. It is also permissible to conclude, as the jury apparently did, that USV unduly delayed consummation of the Toll Agreement for MRC, and that the inordinate length of time between the final arrangements in October and the furnishing of the first ore in April were unjustified and intended to forestall Nisley-Wilson operations.

USV invokes the sovereignty of its actions as agent for MRC to immunize it from the incidence of the antitrust laws. They say that whatever was done in connection with

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that plant, and these mines were located at Gateway, and we had 45 to 65 miles of haul down a rough road here, and of course, that haul was costly.

Q. If that cost you more to get that ore rather than to get your own ore, why did you do that?

A. Well, we wanted to keep another vanadium operation from getting started.

Q. Whose instructions were you operating under when you did that?

A. I was operating under the instruction of Mr. Van Fleet, from the letters you have already introduced.

Q. Was that during the War?

A. No, this is prior to the War, your Honor. This was prior to the War.

the Toll Agreement was done as an agent for the government, MRC, and that regardless of their motives, no liability can attach under the antitrust laws. What we said in that respect in Balsley is apposite here, and we may add that it is one thing to incite or influence government action which results in monopolistic practices as in Eastern R. Conf. v. Moerr Motors, 365 U.S. 127. It is quite another thing to utilize, or attempt to utilize, governmental powers conferred upon a private agency such as USV for unintended and illegal ends. See Balsley, p. 34. The Toll Agreement was terminated promptly on January 1, 1944, at the direction of MRC, at a time when vanadium was in over-supply and the government emergency procurement program had largely served its purposes.[16] The MRC directive, dated December 1, 1943, required USV to give Nisley-Wilson thirty days notice that the Toll Agreement would not be extended beyond its expiration date (January 1, 1944) "unless you have reason to believe that the procurement should be continued in the interest of the procurement of other products than vanadium."[17] This directive originated in Washington. It constituted governmental action and it was entirely consistent with governmental policy to discontinue the emer-

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[16]MRC continued to operate its vanadium plants at Durango, Colorado and Monticello, Utah until February 1944, but it was a government operation as distinguished from operations under the Toll Agreement.

[17]Attached to the termination directive addressed to USV was a letter from the Vice Chairman of the War Production Board to the Secretary of Commerce, dated November 22, 1943, in which reference was made to the vanadium ore program on the Colorado Plateau and to problems as, "a result of which it appears necessary to completely alter the responsibilities and functional operation of the entire vanadium program.

"In the first place, the supply-demand situation of vanadium has changed substantially in recent months. It now appears that

gency procurement program.[18] There is nothing to indicate that USV exercised any control, or even influence, in its initiation. The government-owned plants at Durango and Monticello ceased operations in February of 1944, and appellants' plants at Uravan and Naturita were either closed or their operations greatly curtailed. By November of 1943, the demand for vanadium had been "satiated,

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the total requirement of vanadium can be supplied by those plants which are owned and operated by private industry without recourse to either of the two government plants referred to above or to the program with respect to subsidized operation at the Nisley & Wilson, Gateway plant.

"In this connection, it is important that the operations at all three of these plants, although previously necessary in the interest of the war program, have been carried out at a loss to the government because of costs involved which were in excess of the price which could be realized for the final product: vanadium pentoxide.

"At the same time, it has developed that the Army is actively interested in this same vanadium program for reasons other than vanadium. This Army program has reached a point where the entire emphasis of the program is now on materials other than vanadium. Under the circumstances, therefore, the program can no longer be considered a vanadium program and it cannot continue to be operated as such, by or under the direction of the War Production Board."

[18]On December 13, 1943, Nisley and Wilson wrote to Mr. Henry J. Leir of the Continental Ore Company, in part as follows:

"The trend in this section is for the Metals Reserve Company to relinquish ore-buying contracts and drop out of the ore-buying business. Control of production is to be returned to individual companies.

"The most serious problem which will arise out of the change of control, as far as the production of vanadium is concerned, is the buying of vanadium ores. The M.R.C. have raised the price of ore to such a high level that it will make the cost of the finished product 20¢ over the old price of $1.10. It will not be possible at the present time at least to buy the crude ore at the prices existing before the M.R.C. began buying ore. The M.R.C. raised the raw ore price from the old level of 21¢ to 31¢ per pound of contained V_2O_5. The hauling price was also raised on the ore. The raises will amount to about 20¢ per pound of recovered vanadium pentoxide. This raise can be readjusted in time but at present labor is scarce and also costs more per ton of ore pro-

the shortage was at an end."[19] These facts are undisputed in the record and they speak for themselves.[20] We are thus brought to the conclusion that the termination of the Toll Agreement cannot be imputed to a conspiracy to monopolize, attempt to monopolize, or to individual attempts to monopolize.

But even so, it is fairly inferable that more forces were at work to bring about the downfall of the Nisley-Wilson enterprise than the mere forces of nature or the inexorable laws of economics. In determining whether a jury finding of actionable damages is justified by the record, we must consider the plight of the enterprise in the environment of an established conspiracy to monopolize or attempt to do so. We must proceed on the factual premise that the appellants had set about to deter and hamper the appellees wherever they could. While the surface tributary ore was removed before Nisley-Wilson succeeded to the venture, we cannot say that the mill was not physically and technologically capable of profitably producing oxide ore in a free market. Nor can we positively say that they were not deliberately excluded from the available market during the infancy of the enterprise and when it was delicately balanced between success and failure. Nor are

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duced. The raise in ore price is the only serious problem which we see in the way of production.

"We would appreciate any information which you may be able to give us concerning a market for the vanadium after the first of the year and also the price. We would like to formulate plans as soon as possible for the change in operation.

"We appreciate very much your past cooperation and sincerely hope that plans can be made for an operation which will be of mutual benefit."

[19]Quoted from appellees' brief.

[20]Wilson testified that they did not commence operations after cancellation of the toll agreement because there was "no sale for the vanadium • • • no outlet for it at all."

we able to repudiate an implicit finding by the trier of the fact that they were deliberately deprived of the full benefit of the Toll Agreement during the MRC program when vanadium was in short supply. As we have seen in Balsley and from evidence of record, with the advent of the Manhattan project in the latter part of 1942, interest on the Plateau shifted from vanadium to uranium. Plant equipment was modified to process uranium sludge. There was evidence to the effect that Nisley-Wilson had conducted some experiments, and from a survey of the USV uranium plant at Uravan, determined that with little modifications, their plant was also capable of processing uranium sludge for which there was a very definite market. There was evidence to the effect that their attempts toward readying their plant for this process were met by the positive statement of a USV official that "I won't permit you to get into the uranium business"; and "I don't intend to let you operate." While these incriminating statements may have been apocryphal, no one familiar with this record can doubt the power and ingenuity of the responsible maker of the statements to make good his boast. The fact is that they didn't operate, while at the same time USV and VCA were entering into contracts with the government to process uranium sludge for the vital requirements of the Manhattan project. True, the contracts were secret and not for profit, but they kept the mill wheels turning until the coming of the uranium bonanza in 1947. Viewed in this setting, we cannot say that the jury's finding of attributable harm is unsupported in the record.[21]

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[21]Nisley summarized his case as follows: "When we were denied the right to get into the uranium program at that time by Mr. Burwell, coupled with the fact that U.S. Vanadium had

The appellants challenge the amount of the verdict as based upon wholly erroneous criteria for damages. In addition to the general instruction, applicable alike in the consolidated cases, concerning the necessity for proving by a greater weight of the evidence the combination and conspiracy, with resulting damages, and the amount thereof, the Court instructed the jury with respect to the Nisley-Wilson case that if they found by a preponderance of the evidence that the appellants violated the antitrust laws as they had been instructed on the subject, and that because of these violations, Nisley and Wilson were unable to operate their mill, they were entitled to damages, based upon the "probable and inferential proof", as well as by direct and positive proof; that in considering the amount of the damages, they could take into consideration (1) the expense involved in establishing the business; (2) the increased cost incurred in running the business by reason of antitrust violations; (3) the inability to make profits which would otherwise have been made but for such violations; and (4) the diminished value of the appellees' business by reason of being excluded from the market. With respect to prospective profits, the jury was instructed that if they found that Nisley and Wilson would have continued to succeed in the vanadium, and later the uranium industry but for the violations, they might, in calculating the damages, consider the business

already stripped the ore bodies that were contributory to our plant, which had the effect of slowing down the ore delivered during the Metals Reserve period, together with the fact that we were held out of practically all of our production for approximately six to nine months during the part of the Metals Reserve program when everything you had could be sold, that put us at such an economic disadvantage with the big companies that it just wasn't practical to attempt to go ahead."

records of the appellees, their experience, know-how, and knowledge in comparison with the success of the appellants as disclosed in their business records and the expert opinion of witnesses, including Frank Nisley. The jury was then again reminded that they must first find by the greater weight of the evidence the alleged violations and their injurious impact upon the appellees.

The verdict in the sum of $40,000.00 is based primarily upon the operating records of the Nisley-Wilson mill throughout the Toll Agreement, and also upon Nisley's estimation of the profits the mill would have earned, if it had been free from the fetters of the combination and conspiracy. We know that loss of profits and diminishment of assets are proper elements of damage, and we know too that the owner of the affected business is competent to testify concerning his opinion of damages. And see Atlas Building Products Co. v. Diamond Block & Gravel Co., supra. There was, to be sure, testimony to the effect that the mill never earned a profit at any time, even under the Toll Agreement, and that it failed by reason of economical and technological factors, of which the appellants had no control whatsoever. See Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555; Atlas Building Products Co. v. Diamond Block & Gravel Co., supra; Twentieth Century-Fox Film Corp., et al. v. Brookside Theatre Corp., 194 F.2d 846. But, all of these discrepancies, inconsistencies, and even incongruities were for the jury, and we are unable to say that the economical factors which entered into its verdict were irrelevant to the ultimate issue.

The judgment is affirmed.

No. 6320

Union Carbide and Carbon Corporation and
Vanadium Corporation of America

vs.

John F. Wade, et al.

Like Nisley-Wilson, this case is an alleged facet of the conspiracy to monopolize, and attempt to monopolize, described and sustained in Balsley. The appellees, suing as members and representatives of members of a dissolved partnership, claim to have been driven out of business by force of the monopoly by means of which they were forced to sell valuable mining claims on the Plateau to USV for grossly inadequate consideration.[22] The appeal is from a judgment based on a jury verdict in the sum of $200,000.00, representing the reasonable value of the claims, tripled to $600,000.00.

Also as in Nisley-Wilson, we start with an established conspiracy to monopolize the mining, processing and marketing of vanadium and its products on the Colorado Plateau. The burden of our inquiry here is the sufficiency of the evidence to support the findings of the jury to the effect that the claimants were damaged as a proximate result of the monopoly, and if so, whether to the extent

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[22]The triable issue was submitted to the jury in the following instructions: "The plaintiffs Wade and Curran claim * * * that the United States Vanadium, and later Union Mines, both wholly-owned subsidiaries of Union Carbide, acquired their properties pursuant to a conspiracy to monopolize the vanadium industry, and as a direct result of a plan to keep these claims from becoming a nucleus for the maintenance of a vanadium mill operated by outsiders to the conspiracy."

of its verdict. Some background facts related to Balsley and Nisley-Wilson are appropriate to bring this case into its proper perspective with those cases.

In 1939, John Wade, Thomas Curran and H. R. Redington obtained two carnotite ore leases on the Navajo Reservation known in this case as the "Martin Claims." In the latter part of 1941, Redington began negotiations to sell these claims to VCA. The plan was for Redington to covertly obtain an option from Wade and Curran on their interest and then turn them over to VCA, and thus "get rid of Curran and Wade." VCA wanted the claims to put together with others as a nucleus for an operation in that area, the ore to go to the government-owned VCA-operated mill at Monticello.[23] When Redington was unable to secure options on the Wade-Curran interest in the leases, he sold his undivided ⅓rd interest to VCA for the sum of $13,000.00 in June 1942. Meanwhile and in May 1942, Curran wrote to USV, seeking to sell vanadium ore to the government-owned USV-operated mill at Durango. Curran's letter addressed to USV's General Superintendent at Uravan was transmitted to VCA in New York.

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[23]On October 23, 1941, VCA's General Manager wrote to Superintendent of the Monticello plant on the subject of Navajo Indian land in part as follows: "The idea now is for Redington to obtain an option from Curran and Wade on their interests and then turn the whole thing over to us. I believe that if we can get these Redington claims, together with what we may develop on our lease lands, we may have the nucleus of an operation in that area, the ore to go to Monticello. Please don't say anything about this deal with Redington, since he is trying to get options from Curran and Wade before they get wise to the fact that he is dealing with us. I have gone into this matter with the Indian office in Washington and there will be no trouble about the transfer of Redington's lease to us for cash, provided we can get rid of Curran and Wade."

When, however, the MRC vanadium-ore-buying program, described in Balsley and Nisley-Wilson, was commenced in May 1942 through USV as its agent, the field representative of USV-MRC negotiated with Wade and Curran for their ore from the Martin Claims.

The assignment of Redington's undivided 1/3rd interest to VCA was disapproved in September 1942 by the Department of Interior because VCA and Wade and Curran were unable to work out an operating agreement covering the lease. The ore from these claims was mined and delivered under the USV-MRC contract to the Durango mill by a partnership composed of Wade, Curran and Redington, until the contracts as revised and amended from time to time were finally cancelled in February 1944.

In the early part of 1943, Thomas Curran told the USV-MRC field representative of another ore discovery on the Navajo Reservation and of his financial inability to comply with the departmental requirements to obtain a lease on the claims. Curran asked the USV-MRC representative to assist him in getting financing from MRC. When MRC refused to make a loan, the USV-MRC representative asked USV to provide the necessary financing and USV agreed. A partnership entitled Curran Brothers and Wade was the successful bidder for a prospecting permit on approximately 168 square miles of the Navajo Reservation, which included the discovery. The partnership made a down payment of $1,000.00 on the bonus price for the permit and USV purchased an undivided 2/3rds interest in consideration of the payment of the balance of the bonus price in the sum of $4,000.00, and an agreement to procure the nec[redacted]

mapped, and pay ⅔rds of the cost of the roads and other improvements. In accordance with applicable departmental regulations, the permittees selected 960 acres within the prospecting permit on which a lease was ultimately issued to the partnership composed of Thomas Curran, Charles Curran and John Wade. An undivided ⅔rds interest was immediately assigned to USV. Thereafter and by agreement of the parties, the 960-acre lease was divided in severalty and Curran Brothers and Wade became the separate owners of ⅓rd of the leases known here as the "Cove Mesa Claims."

Contemporaneously with these events, the Manhattan District was created for the purpose of developing the atomic bomb, and became interested in the exploration for uranium ore on the Colorado Plateau. General Groves, who was in command of the Manhattan project, selected USV and its wholly owned subsidiary, the Union Mines, to conduct exploration on the Plateau. In May 1943, it entered into a letter contract with Union Mines to "conduct preliminary reconnaissance, surface prospecting, detailed geological mapping, sub-surface prospecting, and other physical exploration and development work at promising locations of S-37" (the secret code word for uranium); and "When promising deposits of S-37 [i.e. uranium] are discovered or are reasonably believed to exist as a result of the work hereunder, the contractor [Union Mines] shall make recommendations to the contracting officers for the acquisition of the strongest possible control of the production and disposal of the desired resources." The work was to be performed at the [redacted] the government without [redacted] fee to USV

or Union Mines. Like every other phase of the Manhattan project, information relating to the work contracted for was classified and restricted under penalty of applicable criminal law. Comprehensive monthly progress reports were to be submitted as promptly as possible covering all phases of the work in progress and which was contemplated. A colonel in the Corps of Engineers in charge of the raw material section of the Manhattan project was placed in command and supervision of the Union Mines program on the Plateau, and directed its operations from the very outset.

Immediately after the issuance of the prospecting permit to Wade-Curran, and the assignment of 2/3rds interest to USV, Union Mines' exploration crews, under the direction and supervision of the Army command, went upon the area covered by the permit and conducted extensive exploration before the deadline fixed in the permit for the selection of the area to be included in a departmental lease. As a result of this work, "a number of mineral deposits with attractive possibilities" were discovered.[24] Because of the restrictive and confidential nature of the Union Mines agreement with Manhattan and the work to

[24] In a confidential and restricted memorandum of events and conversations between representatives of USV, Union Mines and the Colonel in command of the Union Mines project on the Plateau, dated November 30, 1943, the Colonel stated in part as follows: "On or about 26 August 1943, and subsequent to the date the sub-deal between USV and Wade & Curran was made, Union Mines started exploratory work on the property with one field party. A few weeks later the Union Mines' exploratory force working on the property was increased to two field parties and during October the force was still further increased to three field parties. The work being done by Union Mines on the property was inspected by a representative from this office during the early

be performed thereunder, Wade-Curran did not know of the government's interest in the area for uranium, and indeed did not know of the relationship between USV's Union Mines and Manhattan.

According to the restricted memorandum referred to in Note 22, and other undisputed record evidence, soon after USV's acquisition of the ⅔rds interest in the prospecting permit, USV notified the Plateau Director of the Manhattan project that they were holding such interest "primarily for the benefit of Union Mines in order to facilitate its work on the Navajo Indian Reservation"; and that "arrangements could probably be made for Union Mines to acquire all of USV's interest in the deal by reimbursing USV for the actual expenses it had incurred if it were deemed advisable for Union Mines to make such an acquisition." The USV interest in the lease was eventually transferred to Union Mines without profit, and contemporaneously therewith negotiations were commenced between Wade-Curran and USV-Union Mines to acquire the Mesa Cove leases representing the other ⅓rd interest in the original 960-acre lease. The Corps of Engineers specifically authorized USV-Union Mines to purchase the Cove Mesa lease for the sum of $12,500.00, $3,500.00 to be paid on the execution of an option, and the remainder upon formal transfer with approval of the Department of

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part of November and information so gathered indicates that as of that date, the Union Mines' forces had explored most of the property except a relatively small area on the south end and as a result of this work had discovered a number of mineral deposits with attractive possibilities. Also, arrangements were then being made to explore the rest of the property during the latter part of November and before the deadline date for selection of the 960 acres to be retained by Wade & Curran and USV."

Interior.[25] The transaction was finally consummated on the following April 17, 1944. The leases were originally taken in the name of MRC because the Corps of Engineers was not authorized to own mineral interests. It was, however, eventually transferred to Union Mines, and upon the conclusion of the Manhattan project, the entire lease was transferred to the Atomic Energy Commission in 1947, and by it leased to VCA, which operated it extensively and profitably for uranium under the AEC program.

In summary, the factual theory on which the appellees rely to support the jury's verdict is to the effect that as a part of the conspiracy to monopolize ore claims on the Colorado Plateau, USV and VCA agreed that the area in which the Wade-Curran Martin Claims were located would be apportioned to VCA; that in order to eliminate Wade-Curran, VCA connived with their partner, Redington, to acquire the Martin lease as part of its operations tributary to the Monticello Plant; that after VCA was unable to acquire the leases, USV used its MRC powers to negotiate discriminatory ore-purchasing contracts to the detriment of Wade and Curran and the benefit of VCA; that while Wade and Curran were in debt as a result of their operations, USV utilized its MRC powers to prematurely and purposively cancel Wade and Curran's MRC contracts for the purchase of ore from the Martin

[25] On March 22, 1944, a USV representative in New York advised a Union Mines representative by inter-company correspondence that it was "propitious" to take immediate steps to purchase the Wade-Curran interest "as authorized by Mr. Guarin [the Army officer in charge of the Plateau operations] because of the fact that Curran Brothers and Wade have some $3,000.00 in outstanding obligations which they must meet."

Claims; and, exercising its powers as another arm of the government through Union Mines, USV executed a "squeeze play" on Wade and Curran to bring about a distress sale of its Cove Mesa claims, with the knowledge that they were highly valuable for uranium, a fact unknown to Wade-Curran. The argument goes on to the effect that USV acquired the undivided ⅔rds interest in the Wade-Curran prospecting permit on behalf of itself for the purpose of furthering a pre-existing conspiracy to monopolize the industry by eliminating outsiders; that it was more interested in getting rid of Wade-Curran first, and then deciding whether under all the circumstances it could hold on to the properties for its own benefit, or whether the situation required it to turn the properties over to the government.

At this point it is important to note again, as we did in Balsey and Nisley-Wilson, that in the latter part of 1943 and the first part of 1944, when the search for uranium was under way, the war-time need for vanadium ore had been fully satisfied, and the MRC emergency-purchasing program was at an end. Accordingly, on December 11, 1943, MRC's Executive Vice President notified its agent, USV, to discontinue the purchase of all roscoelite ores from VCA as soon as practical, not later than December 24, 1943; and to "proceed, where contractual rights permit, to notify all producers, including Vanadium Corporation of America, that the Metals Reserve Company's vanadium-buying program will terminate on February 28, 1944, but in all cases where in your opinion, existence of cancellation right is doubtful, please forward to us immediately a copy of the contract with proposed notice of

cancellation. "* * * arrange for orderly liquidation of miscellaneous agreements and leases in connection with the ore-purchasing program."

A 30-day notice of cancellation, dated January 29, 1944, was sent to all ore producers with contracts under the MRC ore-buying program, including Wade-Curran. A government attorney was sent to the Plateau for the purpose of assisting in the termination of the contracts, the duration of which were in dispute. The government-owned Durango mill was shut down on February 29, 1944 and no ore was accepted under the MRC program after that date. Wade-Curran protested the cancellation of their contract directly to the USV-MRC representative on the Plateau who had negotiated the contract, and also to the MRC in Washington. They insisted that their contract was for the duration of the war and requested permission to deliver sufficient ore to liquidate their outstanding obligations in the approximate amount of $3,000.00. At first they refused to discuss the matter with the government attorney. Finally, and on March 15, 1944, in a letter, the text of which was dictated by MRC in Washington, USV-MRC notified Wade-Curran that to comply with their request to be reimbursed for their $3,000.00 indebtedness or accept delivery of additional ore in that amount "would result in your receiving special treatment not accorded to any other vanadium ore producers in the Sandstone Vanadium Area." After some further negotiations, the ore-purchasing agreement was finally cancelled by mutual consent on April 19, 1944. It was the last ore-purchasing agreement to be formally cancelled. It is thus unmistakably plain that the MRC vanadium-ore-purchasing con-

tracts with Wade-Curran were terminated by governmental action, even as the Toll Agreement in Nisley-Wilson. As we have seen, both agreements were cancelled in recognition of the termination of the MRC emergency vanadium-ore-purchasing program.

It may well be, however, that the attempted acquisition of the Martin Claims by VCA in 1941 was a part of a plan to cartelize the vanadium ore claims on the Colorado Plateau. And, it may also be accepted for purposes of this case that USV, acting for MRC, negotiated disproportionately low ore prices with Wade-Curran as compared with contemporary ore prices with VCA in furtherance of the conspiratorial plan. This issue is presented by Wade-Curran as plaintiffs in the Balsley case. And, it may also be assumed for purposes of this case that USV contrived to buy into the Wade-Curran prospecting permit as a part of the same plan of monopolization.

But, whatever may have been USV-VCA plans in that respect, we are certain that the Manhattan District entertained no such plans or designs for its contractor; and we are furthermore certain that the Army, acting in the name of Manhattan District, exercised complete control of and shaped the critical events to come. The undisputed proof is that the contract with Union Mines was entered into in accordance with the customary practices of the Corps of Engineers to contract for the performance of its governmental functions. As its field representative for the performance of the Union Mines contract, USV selected the same employee (a Mr. Hill) who had negotiated the suspected ore-purchasing contracts under the USV-MRC vanadium ore-purchasing program. But the Army officer

in command of the project on the Plateau promptly replaced the USV employee with a Mr. Ridgeway, a hard rock geologist from the Bureau of Mines. The evidence is undisputed to the effect that Manhattan instructed USV-Union Mines to gain access to the Navajo Reservation for the purpose of conducting extensive explorations for uranium on a large area. The responsible Army officer testified that he learned of USV's interest in the Wade-Curran exploration permit just a few days after its acquisition; and that it was "just perfect for the purposes we had in mind." The record shows that USV acquired its ⅔rds interest in the permit on August 24, 1943. Two or three days later, Union Mines' crews were on the reservation under the direction of Manhattan. (See Note 24.)

USV's ⅔rds interest in the permit was transferred to the government at cost, and the responsible Army officer on the Plateau directed the purchase of, and dictated the price to be paid for, the other ⅓rd interest known as the Wade-Curran Cove Mesa leases, with knowledge that Wade-Curran was in debt in the sum of $3,000.00.[26] The

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[26]The Army officer testified in this respect as follows:

"A. Well, the first time I heard about these people [Wade and Curran]—this was the second time—any problem that I had to get into that concerned these people—the first time I heard about them they needed $4,000.00 I believe it was, to complete a contract to buy this exploration lease, and they didn't have any money to pay it with. The next time I heard about them they were in debt, so it was told me, $3,500.00. Now, I mean, it was just a natural thing to me. It just seemed to me that that's the kind of people we're dealing with. And it also meant to me—I mean, to me personally—that here was probably a legitimate reason why they wanted to sell; and otherwise, I'd be a little suspicious maybe that everything wasn't as being represented to me, maybe they're trying to sell a white elephant or something. • • • Q. Who made the final determination of the price which Union Mines would pay for these and other properties? A. I

entire interest thus acquired was held by the government until leased to VCA for uranium operations under the AEC program in 1947. The bare fact of USV's acquisition of the property and its ultimate assignment to VCA by AEC does tend to generate suspicion in a conspiratorial environment. In this setting, their every act was suspect. Nevertheless, it cannot be said on this record that the acquisition of this property by the government through confidential and restricted governmental action was in furtherance of the conspiracy to monopolize or attempt to monopolize the uranium industry on the Colorado Plateau. No one seems to suggest that the AEC-VCA transaction in 1947 was in furtherance of a pre-existing conspiracy. But, if they do, no one suggests the legerdemain by which the circuitous feat was accomplished. Surely it cannot be said that they utilized the AEC powers to that end.

In this critical respect, this case is different from Balsey, wherein the USV-MRC ore-purchasing contracts were under the discretionary control of USV as agent of MRC, with discretionary power to negotiate contracts for the effectuation of its monopolistic plans. And, this case is also decisively different, we think, from Nisley-Wilson, wherein the conspirators were enabled to enfeeble their intended victims by forestalling the performance of the

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did. On the recommendation of Union Mines. My directive from General Groves was—and that was in the contract, too—I mean, I'm an Army officer, and I had to follow orders in my directives. And my directives were in any of these acquisitions that Union Mines had to make a formal written recommendation of what was a fair price to pay. And that had to be a fair price to the party that they were buying from and a fair price to the government. But we had to have their recommendation in writing. Now, that didn't mean that I had to agree to that, but I first had to have that recommendation."

Toll Agreement, and then taking advantage of governmental cancellation of it to effectuate their plan to eliminate Nisley-Wilson as a potential competitor in the milling business. The distinction lies in the fact that in Balsley and Nisley-Wilson, the conspirators possessed, and are conclusively found to have exercised, governmental powers, or taken advantage of governmental action, to their wrongful ends, whereas in this case, they lacked the power to commit the acts of which they are accused because of the positive intervention of governmental action. In these circumstances, we conclude that the judgment cannot be factually supported, and it is REVERSED.

PICKETT, Dissenting in part.

I respectfully dissent from that part of the opinion which deals with the class action. After the liability of the defendants had been established by verdict, the trial court interpreted Rule 23(a)(3), as authorizing individuals who had not been named as parties but were alleged to have been damaged by defendants' unlawful acts to take full advantage of the verdict by filing claims within a specified period, appointed a master to determine the amount of their damages, and directed attorneys for the class to notify them of the verdict in their favor and the court's judgment. This section of the rule defines as a class action one involving numerous persons whose rights are several, but are affected by a common question of law or fact, and in which a common relief is sought. The action defined is neither a true class action nor one in which an adjudication of claims which do or may affect specific property involved in the action is sought. The section

permits the adjudication of in personam claims in one action when there is no privity between the members of the "class" and the right or liability of each is distinct, and suits brought under it are usually referred to as "spurious class actions". I find no case in which it has been held that the rights of a non-appearing member of the "class" would be affected by a judgment entered in the action. Instead the law appears to be as stated in Oppenheimer v. F. J. Young & Co., 2 Cir., 144 F.2d 387, 390:

> "[W]e recently supported such a class action and adverted to the settled rule in the Second Circuit that members of the class who are not joined in such a class suit will not be affected by the decision. In other words, the decision will only be res judicata as to the plaintiffs and parties who have intervened."

The history of Rule 23(a)(3) illustrates, I think, without any doubt, that the class suit contemplated was no more than a permissive joinder device, in cases in which federal jurisdiction has been established, to permit the disposition of claims having common questions of law or fact in one action, without further jurisdictional limitations. The rule was not intended to create a procedure whereby a judgment would determine the rights of non-appearing class members as in other class actions. Professor Moore, who was a dominant force in the formulation of the rule, says:

> "The spurious class suit is a permissive joinder device. The presence of numerous persons interested in a common question of law or fact warrants its use by persons desiring to clean up a litigious situation. While a purist may not like to have the third type of

class action termed spurious, this label serves to direct attention to the practical realities of litigation. The character of the right sought to be enforced for or against the class is

> '(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.'

There is no jural relationship between the members of the class; unlike, for example, the members of an unincorporated association, they have taken no steps to create a legal relationship among themselves. They are not fellow travellers by agreement. The right or liability of each is distinct. The class is formed solely by the presence of a common question of law or fact. When a suit is brought by or against such a class, it is merely an invitation to joinder—an invitation to become a fellow traveller in the litigation, which may or may not be accepted. It is an invitation and not a command performance." (Footnote omitted)—3 Moore's Federal Practice § 23.10 (2d Ed. 1948.)

In All American Airways, Inc. v. Elderd, 209 F.2d 247, 248-9, Judge Clark, who was the official reporter for the Advisory Committee preparing the Federal Rules of Civil Procedure, in commenting on actions contemplated by 23(a)(3), said:

> "In justice to the litigants it must be admitted that there still seems considerable confusion as to the meaning and effect of the third group of class actions authorized by F.R. 23(a), 28 U.S.C.A., a confusion not lessened by the load it bears in its popular legal cognomen of 'spurious class action.' There is perhaps something anomalous in apparent legal participation in a lawsuit by persons unnamed and

unidentified as individuals who, unless they show themselves by intervening, remain legally unaffected by any action taken in the case. The legal rationale lags behind the practical utilities found in the device and its 'psychological value' (3 Moore's Federal Practice 3445, 2d Ed. 1948) on courts and potential litigants. It stands as an invitation to others affected to join in the battle and an admonition to the court to proceed with proper circumspection in creating a precedent which may actually affect non-parties, even if not legally *res judicata* as to them. Beyond this, as we in common with other courts have pointed out, it cannot make the case of the claimed representatives stronger, or give them rights they would not have of their own strength, or affect legally the rights or obligations of those who do not intervene. Oppenheimer v. F. J. Young & Co., 2 Cir., 144 F.2d 387; California Apparel Creators v. Wieder of California, 2 Cir., 162 F.2d 893, 174 A.L.R. 481, certiorari denied 332 U.S. 816, 68 S.Ct. 156, 92 L.Ed. 393; 3 Moore's Federal Practice 3447-3456 (2d Ed. 1948). True, in Dickinson v. Burnham, 2 Cir., 197 F.2d 973, 979, certiorari denied 344 U.S. 875, 73 S.Ct. 169, we noted a query advanced by text writers to the possibilities of extending the scope of *res judicata*, where adequate notice and specific opportunity to come in have been accorded the persons represented; but it is obvious that here in any event no such compulsive notice as the writers visualize is possible as to the unascertained property owners." (Footnote omitted.)

In Nagler v. Admiral Corp., 2 Cir., 248 F.2d 319, 327, Judge Clark said the rule "is in actual effect really little more than an invitation to non-parties closely interested to intervene." In an earlier case, Judge Clark referred to the effect of the rule in these words:

"It does not grant authority to adjudicate finally rights as to nonappearing parties or to confer any additional substantive rights upon the plaintiffs suing. Oppenheimer v. F. J. Young & Co., 2 Cir., 144 F.2d 387; 2 Moore's Federal Practice 2235-2245, 2291; 46 Col. L. Rev. 818; 55 Yale L.J. 831; cases cited in Clark on Code Pleading, 2d Ed. 1947, 405, 407. Hence the rights of the rest of the 4,500 potential plaintiffs are actually not to be settled here, and we cannot give judgment as though they were. We stress this point because at times there appear to be suggestions that the representative character of a suit may aid in recovery." (Footnotes omitted). California Apparel Creators v. Wieder of Cal., Inc., 2d Cir., 162 F.2d 893, 897, cert. denied 332 U.S. 816.

Other courts have taken the same view. Bascom Launder Corp. v. Telecoin Corp., 2 Cir., 204 F.2d 331, cert. denied 345 U.S. 994; Kainz v. Anheuser-Busch, Inc., 7 Cir., 194 F.2d 737, cert. denied 344 U.S. 820; Shatte v. International Alliance of Theatrical Stage Employees, 9 Cir., 183 F.2d 685, cert. denied 340 U.S. 827; Oppenheimer v. F. J. Young & Co., supra; Athas v. Day, (Colo.) 161 F. Supp. 916, 186 F.Supp. 385. Cf. Hanesberry v. Lee, 311 U.S. 32. It is obvious that Rule 23(a)(3) furnishes a useful but limited vehicle for the effective disposition of claims for injuries to the number of parties from the unlawful conduct of others. As pointed out by those who knew what was intended by the section, it merely provides a procedure which permits the disposition of all claims in one action in the instances defined, it did not create a new "class action" as that term is used in the law. 3 Moore's Federal Practice §§23.10, 23.11, (2d Ed. 1948.)

The plaintiff ridicules the doctrine of mutuality and estoppel of judgments as no longer having vitality, thoroughly discredited, and slowly dying. The doctrine has in some instances been justly criticized, but not in cases such as we have here, in which the claimants stand by, with no concern for the statute of limitations or the expense of litigation, waiting for an opportunity to take advantage of a favorable judgment without being bound by one that is adverse to their interest.[1] See Moore and Currier, Mutuality and Conclusiveness of Judgments, Tulane Law Review, Vol. XXXV, pp. 301-330 (Feb. 1961). It might well be possible to devise a procedure which would bind non-intervening members of the "class", but the rule does not in its present form purport to accomplish this.

While as pointed out by Judge Murrah, some students and writers have advocated that Rule 23(a)(3) should be applied as it was by the trial court in this case, and the plaintiff has very eloquently espoused that theory, so far the courts have not looked upon the theory with favor, and we will be the first to fully accept and apply this novel interpretation. As so aptly put by our Chief Judge on another occasion, "It all sounds very well, but questions of law should not be disposed of on noise." I am convinced that the adoption of this concept of the rule will not only lead to its unfair use, but will be conducive to the undesirable solicitation of claims in tort cases in which there are multiple injuries.

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[1] In actions by third parties after a judgment unfavorable to them, the defense of the statute of limitations might be effective.

Appendix B

United States Court of Appeals
for the Tenth Circuit

Union Carbide and Carbon Corporation and Vanadium Corporation of America, Appellants, vs. John F. Wade, et al., Appellees.	No. 6320

JUDGMENT

Thirtieth Day, November Term, Wednesday, December 27th, 1961.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Sam G. Bratton and Honorable John G. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court.

Appendix C

Section 1. Sherman Act

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U.S. Code, Sec. 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2. Sherman Act

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U.S. Code, Sec. 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4. Clayton Act

October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 15.

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Appendix D

Section 12, Small Business Mobilization Act[1]
Act June 11, 1942, C. 404, §12, 56 Stat. 351, 357.

Sec. 12. Whenever the Chairman of the War Production Board shall, after consultation with the Attorney General, find, and so certify to the Attorney General in writing, that the doing of any act or thing, or the omission to do any act or thing, by one or more persons during the period that this section is in effect, in compliance with any request or approval made by the Chairman in writing, is requisite to the prosecution of the war, such act, thing or omission shall be deemed in the public interest and no prosecution or civil action shall be commenced with reference thereto under the antitrust laws of the United States or the Federal Trade Commission Act. Such finding and certificate may in his discretion be withdrawn at any time by the Chairman by giving notice of such withdrawal to the Attorney General, whereupon the provisions of this section shall not apply to any subsequent act or omission by reason of such finding or certificate.

The Attorney General from time to time, but not less frequently than once every one hundred and twenty days, shall transmit to the Congress a report of operations under this section. Reports provided for under this section shall be transmitted to the Secretary of the Senate

[1]Public Law No. 239, 80th Congress, 1st Session, approved July 25, 1947; 61 Stat. 449, at 450, repeals this provision, except that outstanding certificates issued thereunder remain in effect for a period of six months from July 25, 1947, unless sooner revoked.

or the Clerk of the House of Representatives, as the case may be, if the Senate or the House of Representatives, as the case may be, is not in session.

The Attorney General shall order published in the Federal Register every such certificate and, when he deems it in the public interest, the details of any plan, program or other arrangement promulgated under, or which is the basis of any plan, program, or other arrangement promulgated under, or which is the basis of, any such certificate.

This section shall remain in force until six months after the termination of the present war or until such earlier time as the Congress by concurrent resolution or the President may designate, but no prosecution or civil action shall be commenced thereafter with reference to any act or omission occurring prior thereto if such prosecution or civil action would be barred by this section if it remained in force.